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at 10 a.m.
New York

SUMMARY RECORD OF THE 36th MEETING

Chairman:	Mr. VAN DE VELDE (Vice-Chairman)	(Netherlands)
later:	Mr. MIKULKA (Chairman)	(Czechoslovakia)

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In the absence of the Chairman, Mr. Van De Velde (Netherlands), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. KUFUOR (Ghana), referring to the draft Code of Crimes against the Peace and Security of Mankind, expressed his delegation's agreement with the view reflected in paragraph 37 of the International Law Commission's report (A/45/10) that complicity, conspiracy and attempt should be brought within the ambit of the draft Code as separate offences, and placed in the part dealing with specific offences. It would be up to the judges to decide whether those concepts were applicable in specific cases brought before them. Such an approach would ensure that participants in a crime who otherwise might escape criminal responsibility on the ground that they had not actually participated in the commission of the crime, but whose conduct was in fact as reprehensible as that of the principal perpetrators, were duly covered by the Code. His delegation tended to favour the original version of draft article 15, on complicity, on account of its clarity. The new version of draft article 16, on conspiracy, in simply referring to a "common plan", avoided difficulties in determining the point at which agreement could be said to have been reached between the parties. The word "jointly" in the second paragraph of draft article 16 was confusing and should be deleted.

2. His delegation agreed with the Jamaican delegation that to describe the provisions on complicity as the weak point of the International Convention on the Suppression and Punishment of the Crime of Apartheid was gratuitous and unwarranted. The Convention did not, as was asserted in paragraph 47 of the report, unduly widen the circle of offenders. The Nürnberg Tribunal had treated as accomplices those who had directed, planned and organized the crimes being prosecuted, and there was no reason why the same definition could not be refined and applied to cases under the draft Code or the International Convention on the Suppression and Punishment of the Crime of Apartheid.

3. With regard to draft articles X and Y as submitted by the Special Rapporteur, his delegation wished to make the general comment that the tendency to concentrate on measures to curb the supply of drugs while disregarding the growth in demand was again evident in the formulations proposed by the Special Rapporteur. The problem of consumption was addressed in the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. While it might well be appropriate to leave the issue of consumption to be regulated by national laws, the Commission should at least consider the issue so as to determine to what extent it should also be addressed in the draft Code.

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(Mr. Kufuor, Ghana)

4. Although the article relating to international terrorism seemed to confine the commission of the crime of terrorism to agents or representatives of a State, his delegation thought it important, especially in the light of the call by some delegations to expand the scope of the article to include individuals acting on their own account, that a clear distinction should be drawn between freedom fighters and terrorists. One man's terrorist might well be another's freedom fighter. The struggle of all peoples under colonial and racist régimes and other forms of alien domination was a legitimate one, recognized to be such under the Charter of the United Nations, General Assembly resolution 1514 (XV) and the Declaration of Human Rights. While freedom fighters and liberation movements sought to uphold international law, terrorists sought to undermine it. That distinction was fundamental in the eyes of his delegation.

5. The difficulties still arising in connection with the question of the establishment of an international criminal jurisdiction suggested that time was not yet ripe for an international court of the kind outlined in the report. The Commission's present approach was possibly rather too ambitious, and a more gradualist one might be advisable. He wondered whether, at the present stage, an international court having only a review competence might not be considered a good starting-point.

6. Mr. VIO GROSSI (Chile), referring to chapter II of the report of the International Law Commission (A/45/10), said that the concepts of complicity, conspiracy and attempt should be dealt with in relation to each of the crimes listed in the draft Code of Crimes against the Peace and Security of Mankind, so as to facilitate their application by the courts. Although he was inclined towards the view that they should be included in the part of the draft Code dealing with general principles, he was primarily interested in a precise and clear legal definition of those concepts.

7. He had some doubts concerning the concept of complicity reflected in the draft Code in so far as the concept of perpetrator of a crime against the peace and security of mankind was not defined. Another problem concerned the characterization of acts committed after the perpetration of a crime as acts of complicity. The concept of accessory after the fact appeared to be included, although under the legislation of some countries, it was distinct from that of accomplice.

8. With regard to conspiracy, he emphasized that the offence involved was one in which all participants were perpetrators. Accordingly, it would not be appropriate to include in the definition of conspiracy acts which were committed jointly by several persons, since that would limit participation, or the concept of perpetrator, to those who physically carried out the crime.

9. With regard to attempt, he agreed that while it was difficult, but not impossible, to include it among the crimes against peace, the same was not true in respect of crimes against humanity. He also felt that attempt as envisaged in the draft Code was not clearly differentiated from an abortive crime. He therefore

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(Mr. Vio Grossi, Chile)

suggested, first, that the concept of perpetrator of a crime against the peace and security of mankind should be defined so that a distinction could be drawn between accomplice and accessory after the fact, and secondly, that the concept of an abortive crime should be added to that of attempt. An abortive crime would be one in which the perpetrator had done everything in his power to execute the crime but it had failed because of circumstances independent of his intention; attempt would refer to cases in which the perpetrator commenced execution of a crime through direct acts but failed to carry it through.

10. The legal definition of international terrorism in article 16 as provisionally adopted also raised some questions. First, the terms "agents" and "representatives" of a State were used without an indication of their specific content or of whether they were synonyms. Secondly, the tolerating of acts constituting terrorism was characterized as a crime. Not only did the draft article not make clear what was meant by tolerating, but it also included an element which more properly belonged to the concept of perpetrator. Thirdly, the wording of the article did not provide a legal definition of a crime, but rather a description of a type of conduct. Lastly, he was not clear as to the distinction between terrorism carried out by agents or representatives of a State and the act of aggression referred to in paragraph 4(g) of draft article 12 as provisionally adopted.

11. Turning to draft article 18, on the recruitment, use, financing and training of mercenaries, he suggested that, in the interest of brevity, a formula could be found which would make reference to the concepts laid down in the international instruments in that area.

12. With regard to illicit drug trafficking, it would be more logical to delete the phrase "by the agents or representatives of a State or by other individuals," from draft article X, as it was irrelevant from the point of view of the legal definition of the perpetrators. Likewise, the notion that such traffic constituted a crime only if it was engaged in "on a large scale" should be broadened to include the notion of its constituting a practice, in other words, a series of consecutive acts, even if each act in itself was not an operation on a large scale. The provision concerning money-laundering would be more applicable to the definition of accessory after the fact.

13. The question of establishing an international criminal jurisdiction was undoubtedly the most far-reaching and controversial of those submitted to the Committee. In view of the complexity of the issue and the lack of precedents, it would be preferable for the Commission, rather than presenting various options to Member States, to indicate which option it regarded as most in keeping with the current needs and possibilities. That was all the more necessary as the establishment of an international criminal court to try individuals could profoundly alter internal legal systems and even the very structure of the State.

14. Currently, it was difficult for individual States to decide among the various alternatives presented by the Commission, since the alternatives chosen by one

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(Mr. Vio Grossi, Chile)

State would depend upon the decisions adopted by others. That consideration notwithstanding, if such an international jurisdiction was established, it should be set up on the broadest and most effective basis possible. Efforts should be made to explore the concept of a permanent court which would exercise exclusive jurisdiction over all crimes against the peace and security of mankind, and to which cases could be submitted by any State with an interest in the matter. Such efforts might not lead to consensus, but consensus achieved on a different basis might not meet the desired objective.

15. Mr. BAKER (Israel) said that, in the past, his delegation had voiced concern at the manner in which the Commission had been compiling a list of international crimes for the proposed Code. While the terms of reference made it clear that the offences involved were crimes against the peace and security of mankind, his country had from the beginning considered that the concept referred to the most reprehensible of the crimes committed during the Second World War. Without wishing to cast doubt on the serious nature of the crimes currently constituting the draft Code, his delegation continued to have difficulty envisioning how the existing series of legal and political instruments, including declarations, resolutions and conventions, could be merged into a single code of crimes against the peace and security of mankind. Crimes must be included in the draft on the basis of their being universally accepted as crimes against mankind. Characterizations made in general terms or by reference to documents of a political character intended to serve political organs did not necessarily accord with such a concept, and their transposal to a jurisdictional body might lead either to their non-applicability or to selective applicability through politically oriented considerations.

16. As an illustration, he drew attention to the loopholes contained in two of the draft articles provisionally adopted by the Commission, article 12, on aggression, and article 14, on intervention, which might well have responded to the political demands of some Member States. As a basis for implementation in the context of an international criminal jurisdiction, however, they could raise very serious questions of applicability, as well as of compatibility with article 3, which dealt with responsibility for crimes irrespective of motive. Until such time as a code was produced which could be universally accepted as a legally substantive basis for an international criminal jurisdiction, it would be difficult, if not impossible, to consider the establishment of an international criminal court which could adjudicate on the basis of such a code.

17. With regard to draft article 16, on international terrorism as a crime against peace, he said that the description of the elements of terrorism appeared to be unduly restrictive. The problems of the draft article began with its coverage only of acts of individuals representing States, and not acts of individual terrorism committed by persons, terrorist organizations and other elements having no links with agents or representatives of a State. Such acts were certainly crimes against peace and should be included in the draft article. However, the dividing line between crimes against peace and crimes against humanity appeared to be somewhat artificial, and he feared that it might give rise to misleading interpretations as to the relative seriousness of a particular act of terrorism committed by an individual or a group.

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(Mr. Baker, Israel)

18. He also questioned the provision in paragraph 1 of draft article 16 stating that acts of terrorism, in order to be considered as crimes against peace, must be of such a nature as to create a state of terror in the minds of public figures or the general public. Reflection was needed as to how that provision would be interpreted by a judge in weighing the seriousness of a particular act of terror, and whether it would not impose too restrictive an interpretation.

19. The Commission had been unable to reach agreement on draft article 17, concerning breach of a treaty designed to ensure international peace and security. The principle involved was not limited to the narrow sphere of treaties to which some States might be parties and others not, but was equally relevant to any international obligation to which some States might not be, or might not consider themselves to be, parties. The detailed analysis of the nature of an international obligation and its breach, as set out in the commentary to part one of the draft articles on State responsibility (Yearbook of the International Law Commission 1976, vol. II (Part Two)) might guide the Commission in its current consideration of the subject, especially in determining when any action or inaction, whether in respect of a treaty or another form of international obligation, might constitute a crime justiciable within the framework of the draft Code.

20. Drawing attention to paragraphs 77 to 88 of the Commission's report (A/45/10), he said that the debate on whether drug trafficking should be treated as a crime against peace, a crime against humanity or a crime against the peace and security of mankind once again indicated the ambiguities involved in those distinctions.

21. With regard to the question of establishing an international criminal jurisdiction, he had found the summary of previous efforts in that direction to be instructive. His country had, from the earliest discussions of the topic, been active in advocating such a jurisdiction. The Special Rapporteur might consider extending his summary to include a more detailed analysis of the draft statutes already proposed.

22. While his country's observations and suggestions during the period 1950 to 1953 had been based on the situation existing at the time and were outdated in some respects, their general theme remained valid, as did the material linkage which they had demonstrated between drawing up a list of the gravest of crimes against the peace and security of mankind and the establishment of an international criminal jurisdiction.

23. It was necessary to guarantee that any international criminal jurisdiction would not be linked to political currents, and that its judges would retain their independence and integrity. Before any State chose to concede its own criminal jurisdiction in respect of any individual or group which had committed grave crimes against its people or territory, it would have to be confident that the international court exercising jurisdiction was entirely capable of doing so impartially. That again underscored the necessity for the instrument which would serve as the basis for such jurisdiction to be so clear and unambiguous as not to be open to any form of interpretation other than on questions of fact and law

(Mr. Baker, Israel)

directly related to the crime itself. Any ambiguity stemming from a partisan interpretation of the text, and any political loophole, could prejudice the status and authority of the court and reduce its effectiveness.

24. The nature of the relationship between an international criminal jurisdiction and the United Nations required detailed analysis, not only with regard to the option reflected to in paragraph 136 of the report, which referred to General Assembly or Security Council authorization for the submission of cases, but also with regard to such questions as the election of judges and the composition of the court. Clearly, elections on the basis of the current geographical representation of the United Nations would not guarantee a truly universal choice of judges.

25. Concerning the question of penalties, including the reference to capital punishment in paragraph 149 of the report, the Commission might consider that the matter should be viewed in the light of the penal policy of the submitting State. There might be systems in which capital punishment was applicable for crimes against humanity of a particularly grave and serious nature. The question might be analysed by the Commission in considering the question of penal provisions and in the light of the draft statutes prepared in 1950 and 1953.

26. Mr. MAYCOCK (Barbados) said that his delegation was encouraged to note the progress made by the Commission at its forty-second session on a number of issues, particularly the topics of the jurisdictional immunities of States and their property, and the law of the non-navigational uses of international watercourses.

27. Barbados had noted with interest the Special Rapporteur's eighth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/430 and Add.1). It was pleased to note the Commission's determination to give priority to that topic with a view to completing the first reading of the draft articles at its next session.

28. The security of small developing States, particularly island developing States, was constantly challenged by external threats. Barbados was therefore pleased to note that the three new draft articles provisionally adopted by the Commission at its 1990 session dealt with three of the most insidious threats to the sovereignty and security of small States, namely, mercenarism, drug trafficking, and international terrorism.

29. His delegation had been among those instrumental in having the question of the activities of mercenaries placed on the United Nations agenda, and had been an active participant in the negotiating process that had paved the way for the finalization of the 1989 International Convention on mercenaries. Barbados therefore supported the specific inclusion of that illicit activity in the draft Code. It noted, however, that the current draft provided for the attribution of the crime only to agents or representatives of a State. It would hope that the acts of individuals could also be included in the scope of the draft, as was the case in articles 2 and 3 of the Convention.

(Mr. Maycock, Barbados)

30. The modern phenomenon of drug trafficking had frightening implications for all States, but especially for small States. Drug trafficking constituted both a crime against peace and security and a crime against humanity, in his delegation's view. Barbados was generally satisfied with the treatment of the issue in the most recent text, and was pleased to note that the proposed draft also dealt comprehensively with the question of money-laundering.

31. Barbados commended Trinidad and Tobago for its proposals concerning the establishment of an international criminal court, and reaffirmed the support that, together with other members of the Caribbean Community (CARICOM), it had given to those proposals. The matter had been referred to the CARICOM Standing Committee of Ministers of Legal Affairs for detailed study, and Barbados would, after having had the benefit of that study, state its definitive position on the various options explored by the Commission in chapter II, section C, of its report (A/45/10).

32. Barbados did not believe that finalization of the draft Code was necessarily a prerequisite for the elaboration of a statute for an international criminal court. The comprehensive proposals prepared by the Commission at its forty-second session, in response to General Assembly resolution 44/39, had done much to present the concept in sharper focus. Barbados supported the view that if the Commission was mandated to advance its work in that regard on the basis of comments received from States, it would be in a position to make early recommendations on an appropriate enforcement mechanism, should the draft Code be finalized in the near future. Alternatively, if substantial delays were envisaged in the establishment of the Code, consideration could be given to the possibility of activating the mechanism initially in respect of a reduced number of international crimes.

33. Indeed, Barbados believed that both activities - the finalization of the draft Code and consideration of the question of establishing an international criminal jurisdiction - should be pursued as priorities during the Decade of International Law.

34. Mr. UHOMOIBHI (Nigeria), referring to the topic of the draft Code of Crimes against the Peace and Security of Mankind, noted that part one of the Special Rapporteur's eighth report dealt with complicity, conspiracy and attempt. In some cases, it was difficult to distinguish between what constituted specific offences and what constituted general principles. Nigeria was inclined to regard complicity, conspiracy and attempt as actions constituting important ingredients of specific offences. The actions in question were forms of accessory participation.

35. International terrorism with State involvement, and the recruitment, use, financing and training of mercenaries, which were dealt with in articles 16 and 18, respectively, as provisionally adopted by the Commission, clearly constituted crimes against peace. However, the non-inclusion of the activities of mercenaries themselves in draft article 18 created a very serious lacuna. Even though draft article 12 referred to mercenaries, the criminality of such activities should be emphasized in draft article 18. The classification of draft article X, on illicit traffic in narcotic drugs, was somewhat problematic. On its own, drug trafficking

(Mr. Uhomoibhi, Nigeria)

was a crime against humanity. When viewed in the wider context of possible linkages between drug barons and drug cartels, on the one hand, and both terrorists and mercenaries, on the other, it posed a threat to international peace and security, and as such could qualify as a crime against peace. Article X clearly established that heinous crime as an international crime.

36. Nigeria strongly believed, in that connection, that efforts must continue to be intensified at the bilateral and regional levels to put in place more effective mechanisms for co-operation and mutual assistance in the suppression of illicit drug production, trafficking and abuse. Nigeria had entered into agreements on mutual assistance in law enforcement matters with some countries, while negotiating similar bilateral arrangements with others. Moreover, it had enacted laws imposing stiff penalties for drug offences and had established a national drug law enforcement agency in 1990.

37. On the question of an international criminal jurisdiction, Nigeria was happy to note that the Commission had examined possible options concerning the legal force of judgements rendered by the proposed court, penalties, implementation of judgements, and financing. Nigeria was in favour of an international criminal court with exclusive jurisdiction, without prejudice to the principles of the sovereignty of States and the self-determination of peoples, and provided that the decision to take cases to the court lay with States themselves. Nigeria recognized that an international court offered the advantage of uniform application of all the provisions of the Code, which should remain indicative. It also realized that an international crime might lead to a dispute between States, and that the international court would provide a third-party dispute-settlement mechanism. In so doing, it would contribute to the maintenance of international peace and security.

38. Nigeria wished to make a formal proposal that the dumping of nuclear and hazardous waste in the territories of other States should be included in the Code. Nigeria still had difficulty in identifying the practical means of enforcing the decisions of an international criminal court. It would not make sense to resort to national facilities of States for the implementation of such judgements. On the question of the financing of the court, Nigeria would prefer the United Nations to assume that responsibility, which might however prove difficult, if not impossible, without a commensurate increase in Member States' contributions. In conclusion, Nigeria wished to emphasize that the idea of establishing an international trial mechanism or an international criminal court deserved further study.

39. Mr. ABAD (Panama) said that his delegation noted that the right of asylum was included in the list of topics drawn up by the Chairman of the Working Group on the United Nations Decade of International Law. For over 20 years, more specifically since the coup d'état of 11 October 1968, Panamanians associated with the opposition to the military dictatorship had, year after year, unsuccessfully denounced in all international forums, particularly the Organization of American States, the defencelessness of the Panamanian people. Some of the principal perpetrators of the crimes committed against the Panamanian people during those

(Mr. Abad, Panama)

years had now taken refuge at various embassies of Latin American States in Panama. All the individuals in question, who were former collaborators with Noriega, were laying claim to the right of asylum.

40. In that connection, the Panamanian Government wished to stress that it was acting in accordance with article 14 of the Universal Declaration of Human Rights, which - while stipulating that everyone had the right to seek and to enjoy in other countries asylum from persecution - specified that that right could not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

41. Furthermore, Panama wished to draw attention to article 1 of the Declaration on Territorial Asylum (General Assembly resolution 2312 (XXII)), which - while referring in paragraph 1 to "persons entitled to invoke article 14 of the Universal Declaration of Human Rights" - specified in paragraph 2 that the right to seek and to enjoy asylum could not be invoked by any person with respect to whom there were serious reasons for considering that he had committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

42. Panama wished to refer to article 6 of the Charter of the Nürnberg Tribunal, which stipulated that the Tribunal should have the power to try and punish persons who, whether as individuals or as members of organizations, committed, inter alia, crimes against humanity, namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. The last paragraph of article 6 specified that leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes were responsible for all acts performed by any persons in execution of such plans (United Nations, Treaty Series, vol. 82, No. 251).

43. The relevant principles laid down in the legal instruments in question should be consolidated as part of the process of the codification of international law. Likewise, the principle that persons accused of perpetrating crimes against humanity should be denied the right of asylum must be maintained.

44. Mr. VUKAS (Yugoslavia) said that, in his delegation's view, the concepts of complicity, conspiracy and attempt formed part of the general principles of law referred to in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The new versions of the draft articles dealing with those concepts submitted by the Special Rapporteur (section B.1 of chapter II of the Commission's report (A/45/10)) represented generally satisfactory definitions of those principles. His delegation took the view that the activities concerned were forms of participation in the commission of a certain crime; considered that complicity, conspiracy and attempt should not be treated as separate offences in the draft Code, but should be placed in the part of the draft dealing with general

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(Mr. Vukas, Yugoslavia)

principles. Some crimes, however, might require that complicity, conspiracy or attempt should be specifically taken into account in their regard; such requirements, if any, should be determined in connection with the definition of each particular crime.

45. Turning to the question of illicit traffic in narcotic drugs (section B.2 of chapter II), he said that notwithstanding his Government's strongest condemnation of that crime and profound disdain in regard to its perpetrators, the crime per se could not be characterized as a crime against peace. The fact that illicit traffic in narcotic drugs was often linked with terrorism and was a potential source of conflict between States did not provide sufficient grounds in that respect, and his delegation would therefore prefer it to be characterized as a crime against humanity.

46. His delegation shared the view of those who opposed the inclusion of an article concerning breach of a treaty designed to ensure international peace and security in the draft Code. In addition to the arguments referred to in paragraph 91 of the report, it considered that the very notion of "treaties designed to ensure international peace and security" was so vague that to attempt to legislate against breaches of such treaties meant dealing with a body of international law which was completely lacking in definition.

47. With regard to section C of chapter II, he recalled that his delegation had accepted the idea of the establishment of an international criminal jurisdiction as far back as the forty-second session of the General Assembly. It welcomed paragraphs 117 to 122 of the report, which realistically reflected the many difficulties which would have to be overcome before such a mechanism was established. On the question of the jurisdiction of an international criminal court, his delegation favoured the first of the options referred to in paragraph 123, but considered that States parties to international conventions other than the Code should not be prevented from conferring jurisdiction upon the court. With regard to the nature of the court's jurisdiction, Yugoslavia did not think that more than a review competence was plausible at the present stage of development of international law. All States, organizations and individuals having an interest in a case should be entitled to submit the case to the court. On the question of institutional structure, his delegation favoured the second solution proposed in paragraph 139, and on that of election of judges, the third option proposed in paragraph 142; the judges should, as far as possible, represent the main legal systems of the world. The court's decisions should take precedence over the judgements of national courts.

48. Referring to the relationship between the Commission and the General Assembly (section A of chapter VIII), he said that his delegation would prefer the consideration of the report of the Commission to be structured as a direct dialogue between the Sixth Committee and the Commission. Under the present system, representatives in the Sixth Committee, including members of the Commission, delivered lengthy statements the Commission's reaction to which would not be known until the publication of the next report, or even later. His delegation would

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(Mr. Vukas, Yugoslavia)

prefer shorter statements on selected topics, and a dialogue between representatives and the Commission's members, more particularly the Special Rapporteurs.

49. Mr. KNOX (United States of America) said that in discussing the topic of the draft Code, all delegations started from a common position: all were profoundly concerned at the spread of international crime, all shared the goal of eradicating it, and all were extremely interested in any proposals to that end. It was with regret, therefore, that his delegation felt unable to join those delegations which had expressed approval of the Commission's work on the draft Code. Like the delegation of Italy, it thought that the exercise should be considered in the light of its costs and anticipated benefits. The costs were made up of the time spent by the Commission and the Sixth Committee on the topic, causing the completion of other topics to be delayed, and of the much greater financial and economic costs which would arise in the event of the Code's implementation and, more particularly, of the establishment of an international criminal court. They might, however, be considered manageable if it seemed that the Code might indeed serve as a weapon in the struggle against crimes such as terrorism and drug trafficking. But if it was a chimera which merely diverted attention from more fruitful ways of combating international crime, then they were prohibitively high.

50. The key to determining the Code's potential usefulness was its acceptance by the international community. The Commission's work on the topic at its forty-second session merely confirmed his delegation's conviction that, as it was now being shaped, the Code would not command the acceptance required. Noting the absence of an international consensus on what acts by individuals should be considered crimes against the peace and security of mankind, he said that his delegation continued to assume that the Code was intended to apply to acts of individuals and not to those of States.

51. International agreement existed on many of the acts covered by the draft, for example, aggression by States in violation of the Charter of the United Nations. The difficulty consisted in transforming general agreement about how States should behave into specific criminal provisions designed to regulate the actions of individuals. The international community would doubtless agree that certain acts of individuals in connection with State aggression were violations of international law; recent events in the Persian Gulf brought that out very clearly. But article 12 of the draft Code went beyond defining such acts and, as a result, was too vague to command international agreement. A similar problem arose in connection with other provisions, such as those on drug trafficking and international terrorism. There was a large gap between the general abhorrence at those acts and the specific and detailed provisions needed in the criminal code, and the Commission had so far failed to bridge it. More fundamentally, States did not seem to agree as to which acts should be dealt with in a universal code rather than through specific international conventions, national laws and agreements on enforcement. Existing international conventions on specific crimes were useful, but their relatively small number suggested that time was not ripe to codify the entire field of international criminal law; it also emphasized the extent to which

(Mr. Knox, United States)

the Commission was, in effect, making new law. By drawing upon specific provisions from existing instruments, the Commission might avoid certain difficulties, but would probably give rise to others; in fact, the procedure might run the risk of disturbing the consensus already achieved and thus prove actually dangerous.

52. While it did not mean to imply that a code of international crimes could never be drafted, or that specific international crimes on which international consensus might be achieved could not be identified, his delegation felt that the attempt to codify the whole field of international criminal law was over-ambitious and premature, and therefore urged the Commission once again to spend its time on more useful endeavours. His Government's specific comments on the draft articles provisionally adopted at the Commission's forty-second session were supplied separately in writing.

53. The Commission's outline of issues and options in connection with the establishment of an international criminal court provided a useful basis for more detailed analysis of the problem as a whole. The suggestion that the court might operate, at least at first, independently of the Code, and exercise jurisdiction over a narrower range of crimes, such as those defined in existing international conventions, would resolve the main difficulty he had mentioned in connection with the Code. A Code without a court would seem unhelpful, but a court might be of some use without a Code. However, effective national and international systems for dealing with international crimes were already in place and, as pointed out in paragraph 118 of the report (A/45/10), there was a danger of their being disrupted by the establishment of a court. The question of the court's interaction with existing national and international systems of criminal law enforcement was a fundamental one and should be considered very carefully. There were also many practical questions which had to be addressed before States could decide whether the court would complement the existing machinery or merely interfere with it. For example, what rules of evidence and procedure would the court apply? How would evidence be obtained? Who would conduct the investigation and prosecution, and who would make the crucial decisions as to which individuals should be prosecuted? It appeared that the court might require a large prosecution arm and perhaps a penal facility. What would be their cost? How would they be administered? Most important, how would the answers to those questions affect the current system of national and international enforcement?

54. Given the relatively early stage of the Commission's consideration of those questions, his delegation took the view that the Commission should not be invited to focus its attention on the question of the type of court which should be established; rather, it should be requested to continue its analysis in greater detail, with particular emphasis on practical matters pertaining to the court's relationship to the existing system of enforcement. The results of such an analysis would make it easier to decide what model of a court, if any, would be most likely to enhance the international community's ability to combat crimes which affected all nations.

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(Mr. Knox, United States)

55. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chapter VII of the report), he said that his Government had not changed its view that the Commission should reconsider at least for the time being, its objective of drafting articles for inclusion in a convention on the topic. As with the draft Code, the exercise appeared over-ambitious in view of the lack of consensus. His delegation therefore reiterated its suggestion that the Commission should consider confining itself to the elaboration of draft general principles on the topic, with a view to assisting States in the examination of specific related questions. His delegation's replies to the two specific questions raised by the Commission in connection with the topic were supplied in writing separately.

56. Mr. VILLAGRAN KRAMER (Guatemala) said that although his delegation had had doubts two years earlier regarding the usefulness of pursuing discussions in the Commission on the draft Code of Crimes against the Peace and Security of Mankind, those doubts had been alleviated by the presentation, by the delegation of Trinidad and Tobago in 1989, of the full political and legal dimensions of international drug trafficking. Moreover, the Commission had in a short time presented significant factors to be considered with respect to the establishment of an international criminal jurisdiction to deal with such crimes.

57. The *Achille Lauro* hijacking, the Noriega case, the vast impact of the drug problem in Colombia and other countries, and the situation in the Persian Gulf prompted the idea that sanctions might at some point be applied not to States, but to government leaders, by courts along the lines of the Nürnberg Tribunal. While his delegation understood the concerns expressed by the United States delegation regarding the costs and benefits of the proposed court, it felt that the Commission definitely should continue to consider the question, and should prepare a much more complete text during the coming year.

58. The question of the nature of the proposed court's jurisdiction called for political, not legal, answers. The key question was whether States were ready to entrust cases involving heinous crimes to a more expeditious system. In his delegation's view, the concepts of a court with concurrent jurisdiction and one having only review competence were not mutually exclusive, and the draft Code could envisage both options. As to who might submit cases to the court, his delegation felt that in addition to States, in certain situations intergovernmental organizations could play a useful role. He drew attention in that connection to the valuable example provided by the Inter-American Commission on Human Rights. The requisite political will was what made such an arrangement succeed.

59. Turning to the new articles proposed by the Special Rapporteur on complicity, conspiracy and attempt, he said that the Commission had to prepare a more detailed list of the crimes to be included in the Code, before those concepts could be fully defined. Such a list would also facilitate consideration of the sensitive issues of the competence *ratione personae* and *ratione materiae* of the proposed court. While the Code was to be applicable to individuals, he also could foresee it extending to States and legal persons, for example, in cases involving terrorism or drug trafficking.

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(Mr. Villagran Kramer, Guatemala)

60. The Commission had before it a basic document for consideration of its future programme of work, and his delegation welcomed the recognition by a number of delegations that economic issues merited the Commission's attention. Other pressing issues, including international drug trafficking, disarmament, environmental matters, foreign-debt problems and the Decade of International Law, provided further input for the Commission's future work.

61. Mr. PIZA-ROCAFORT (Costa Rica) said that the draft Code of Crimes against the Peace and Security of Mankind, the question of State responsibility in general and the question of international liability for injurious consequences arising out of acts not prohibited by international law all involved intricately linked issues pertaining to the rights of individuals, States and the international community, guarantees of those rights, the strength of the authority of the bodies responsible for implementing those guarantees and of their decisions, and the responsibilities arising from the infringement of those rights.

62. Turning first to the draft Code, he said that the concepts of complicity, conspiracy and attempt required further refinement. With regard to article X, on illicit traffic in drugs, his delegation continued to believe that the international scope of the problem demanded an international solution, that drug trafficking should be described as a crime in the draft Code, and that the Commission should focus on drug trafficking on a large scale. While drug users certainly bore responsibility for drug trafficking, it would not be practical to define drug use as an international crime. It should be specifically stated that traffic in drugs on a large scale was a crime which all States - irrespective of where the actual crime had taken place - could prosecute and which, in the most serious instances, could be prosecuted by an international jurisdiction.

63. With regard to draft article 16, on international terrorism, the definition must clearly state that the crime included acts perpetrated by individuals who were not agents or representatives of a State. In the matter of State responsibility, there clearly existed a link between an act or omission by an agent or organ of the State and the harm attributable thereto. However, that was not the case where responsibility lay directly with the perpetrator or the accomplices.

64. As to article 18, concerning mercenaries, paragraph 1 appeared to apply the definition of criminal only to agents who recruited, used, financed or trained mercenaries, and not to the mercenaries themselves. With respect to paragraphs 2 and 3, he said that the definition of "mercenary" appeared to exclude individuals who committed one of the acts listed for a reason other than the expectation of receiving material compensation. He trusted that that point would be properly addressed in another paragraph.

65. With respect to the proposed article 17, on breach of a treaty designed to ensure international peace and security, his delegation shared the concerns expressed in the Commission regarding the principle of universality. He cautioned even more strongly against using a generic and atypical definition. The language of the draft Code should be specific enough to ensure that a penalty could be

(Mr. Piza-Rocafort, Costa Rica)

imposed only in accordance with the principles of due process and nulla poena sine lege.

66. Accordingly, each crime should be clearly defined using standard language, and the Code as well as the international criminal jurisdiction should come into play only in cases involving the most serious international crimes. While endorsing the principle of non-applicability of statutory limitations to crimes against the peace and security of mankind, his delegation considered that full judicial guarantees and the principle of non bis in idem must apply. Moreover, his delegation would be unable fully to adhere to the draft Code, particularly to article 4, concerning extradition, unless the death penalty was specifically ruled out.

67. As to the proposed international criminal jurisdiction, he said that the competence ratione materiae of the proposed court should apply to the crimes specifically spelt out in the Code, while still allowing for gradations. Accordingly, as the Commission had suggested, in the case of certain crimes, reservations concerning the jurisdiction or competence of the court, or the obligation to extradite envisaged in draft article 4, should be allowed.

68. As to the nature of the court's jurisdiction, his delegation favoured the third option, an international criminal court having only a review competence. As in the field of human rights, exceptions should be allowed to the rule that internal remedies must have been exhausted. Consideration should also be given to the possibility of establishing some sort of Cour de cassation along the French model during the early stages of the court's existence, and to the application by the court of some form of certiorari as in the Anglo-Saxon tradition.

69. The structure of the court should be defined and established in the Code itself, and the court should be part of the United Nations system. That would not require an amendment to the Charter. The legal force of judgements should be ensured; all the judgements should be binding. He noted in that connection that certain of the decisions of the Inter-American Court of Human Rights were binding, and that his Government accorded them the same status as those of its highest domestic courts. The proposed international court must have similar guarantees if its decisions were to be respected. For the time being, judgements should be implemented under national systems, ensuring that the minimum rules for the treatment of offenders were observed.

70. Turning to chapters V and VII of the Commission's report (A/45/10), he emphasized that while States continued to be the principal subjects to which international responsibility attached, the application to them of criminal sanctions was neither feasible nor useful, and the effectiveness of principles guiding the conduct of States in matters such as environmental protection would continue to have its fundamental legal basis in the patrimonial responsibility of States under international law.

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(Mr. Piza-Rocafort, Costa Rica)

71. Five factors must exist to give rise to State responsibility. Firstly, clear, compensable damage must exist (not just possible damage); secondly, such damage must be directly or indirectly attributable to the responsible subject; thirdly, the damage must be contrary to what is legal (the injured party must not be obligated to bear the injury); fourthly, there must be no concurrent causes providing any legal justification for the damage; and, fifthly, there must exist a direct or indirect, but in any event appropriate, causal link between the act or omission (cause) attributable to the State and the compensable damage (effect). The concepts of fault and wrongfulness must continue to play a key role in determining the extent of reparation. The causal link between the unlawful act and the damage or between the lawful act and the damage, rather than immediate or exclusive, should be appropriate.

72. His delegation could not agree with those members of the Commission who felt that in the determination of responsibility for wrongful acts, the principle of the juridical equality of States should not apply where obvious differences between States existed. However, flexible payment schedules could be worked out when the amount of reparation to be paid by less developed countries was being determined. On the other hand, such differences should be taken into account in connection with responsibility for lawful acts. Material damage should be compensated in accordance with the principle of equivalency. Moral and personal harm, although also assessable and indemnifiable in pecuniary terms, gave rise to reparation based on the principle of equity recognized by the Statute of the International Court of Justice.

73. His delegation was in favour of any steps to protect the environment for future generations, and therefore endorsed the idea underlying the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, to the effect that States and, ultimately, private entities, had responsibilities to protect the environment that went beyond their contractual obligations.

74. His country, given its long history of democracy and the significant strides it had made with respect to education, health and political and social stability, depended very heavily on the rule of law. It accordingly attached the utmost importance to the development of international law and the work of the International Law Commission.

75. Mr. Mikulka (Czechoslovakia) took the Chair.

76. Mrs. SILVERA (Cuba) welcomed the progress made by the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind. The Code should be sufficiently broad to identify all the acts that must be delimited therein.

77. In view of differences in the methodology and treatment of complicity, conspiracy and attempt - all forms of participation - under the criminal legislation of different countries, the task of codifying those concepts was very

(Mrs. Silvera, Cuba)

complex. Its complexity was compounded by the need to determine the degree of responsibility attaching to each criminal act in order clearly to delimit the precise content of each act. Accordingly, the question of responsibility and its application to crimes against the peace and security of mankind should be very clearly enunciated in the future Code so as not to invite multiple interpretations of the norms involved.

78. Her delegation was pleased that international trafficking in drugs was included as a crime against the peace and security of mankind, as reflected in draft articles X and Y as submitted by the Special Rapporteur. She emphasized the importance of co-operation among States to combat international drug trafficking. The failure of some States to co-operate by combating manifestations of that crime within their own territory, including transit, distribution, sale, consumption and money-laundering, contributed to the disintegration of society. Her delegation welcomed the emphasis which paragraph 85 of the Commission's report (A/45/10) placed on international co-operation as a key to the eradication of the scourge of drug trafficking. Cuba had adopted bilateral co-operation agreements with some countries, while in other cases, the lack of political will had prevented their conclusion. The relevant provisions of such agreements should preserve the principles of sovereignty, territorial integrity and political independence.

79. She reiterated her delegation's doubts regarding the desirability of establishing an international criminal court. The subject was highly controversial, given the existence of different legal systems and the likelihood that conflicts would arise, inter alia, with respect to the nature of the court, whether there should be concurrent jurisdiction, and matters pertaining to extradition, cases in which a crime occurred in a third State, priority of jurisdiction, operation and composition of the court, and financial issues. It also had to be determined whether the court would be linked with the United Nations or would function independently. Her delegation was opposed to the idea of an international court with exclusive jurisdiction; Cuba would not cede national criminal jurisdiction. Other questions to which the proposal gave rise included the structure of the court, enforcement of penalties, the application of the principle of extraterritoriality to nationals and their property, and the question of who could initiate proceedings.

80. The current international situation had little impact on the profound differences of views regarding the scope of the proposed court, and it was thus premature to link the draft Code to such a mechanism. The Commission first had to define in explicit legal terms the acts or offences which should be included in the Code, such as aggression, the practices of apartheid, colonialism and other forms of foreign domination, international terrorism, mercenarism, the threat and use of force, and international drug trafficking. The Commission must also devise provisions covering States which disregarded the Judgments of the International Court of Justice.

81. With respect to article 18, on the recruitment, use, financing and training of mercenaries, her delegation felt that the definition should have been broader and

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(Mrs. Silvera, Cuba)

should not have been linked with that of the 1989 Convention, which was limited in scope.

82. Her delegation looked forward to further progress by the Commission on the Code and on other important issues of international law which called for urgent attention in the light of the activities planned for the Decade of International Law.

83. Mr. JACOVIDES (Cyprus) said that the report of the International Law Commission (A/45/10) showed that both the Commission and the Secretariat had once again performed substantive and solid work, and that, responding to General Assembly resolution 44/35, the Commission had succeeded in considering all the six topics in its current programme of work.

84. The Commission had also responded promptly and fully to the request of the General Assembly on the important question of the establishment of an international criminal jurisdiction. In his delegation's view, priority should be given to the draft Code of Crimes against the Peace and Security of Mankind and the question of State responsibility, without detracting from the importance of other topics.

85. With regard to chapter II of the report, he said that the Special Rapporteur had submitted three draft articles dealing with conspiracy, complicity and attempt which were eminently suited to inclusion in the proposed draft Code, thus keeping pace with the concerns of the international community. His delegation, on the basis of its long-held view that the draft Code should incorporate the three elements of crimes, penalties and jurisdiction, welcomed the Commission's conclusion on the desirability of establishing an international criminal court: such a court would be a progressive step in the further development of international law and, if widely supported by the international community, would strengthen the international rule of law.

86. Also in connection with chapter II, his delegation noted and generally approved the three articles provisionally adopted at the Commission's most recent session, on international terrorism, mercenaries and illicit traffic in narcotic drugs. It recalled the support it had expressed in the Sixth Committee in 1989 for the inclusion in the draft Code of an appropriate provision, to follow draft articles 12 and 13, to cover the case of deliberate non-compliance by an aggressor with binding decisions of the Security Council. The proposal, for a third phase after the threat of aggression and aggression itself, was a logical step towards filling a gap, and had certainly proved prophetic in the light of the Gulf crisis. His delegation supported its inclusion in the draft Code in the interests of making provision for the type of illegal actions which had taken place in Kuwait and in the occupied part of Cyprus as a result of foreign aggression and occupation. The two situations were not, of course, identical, but some of the issues involved, and the principles at stake, were certainly the same.

87. Regarding chapter III, entitled "Jurisdictional immunities of States and their property", his delegation, while not underestimating the need to resolve the

(Mr. Jacovides, Cyprus)

remaining substantive issues, was pleased to note the substantive progress achieved towards finalizing the draft articles.

88. Similarly, in the context of chapter IV, "The law of the non-navigational uses of international watercourses", it welcomed the prediction that by the next session there would be a complete set of draft articles on the topic adopted by the Commission on first reading.

89. Turning to chapter V, "State responsibility", he said that more rapid progress should be made on the topic, particularly in view of its importance and its relationship with other topics, such as the draft Code and international liability for injurious consequences arising out of acts not prohibited by international law. In that connection, he wished to state his delegation's view that it was no longer appropriate for discussion of State responsibility to concentrate on injury to aliens, thus catering to the requirements of a small number of powerful, developed States, often at the expense of weaker and less developed States. The topic of State responsibility now had a much broader foundation, and it was recognized by such organs as the International Court of Justice, that there existed obligations erga omnes, and that the interests of the international community as a whole must be duly taken into account. The Commission must ensure that the expectations of the international community, and in particular those of States which had come into existence after the classical rules of international law on that topic had been formulated, were not frustrated. It must also keep pace with contemporary notions of international law, such as the concept of international crimes, and recognize the opportunity provided by recent shifts of attitude on the part of the major Powers in accepting the notion of compulsory third-party dispute settlement. Procedures for such settlement should undoubtedly be included in the draft articles currently being elaborated on State responsibility.

90. Problems continued to arise, however, with regard to the concept of "economically assessable damage" and "punitive damages", and he agreed that the restoration of a situation through restitution in kind should be given priority whenever such restitution was legally and practically possible: it was indeed indispensable where there had been a violation of jus cogens. His delegation also took the view that the issue of interest should be made part of draft article 8, rather than being included as a separate draft article 9. It was, none the less, encouraged by the assurance that the Commission would be able to devote more time to a topic which was of such importance.

91. On chapter VI, "Relations between States and international organizations", his delegation noted that substantive progress had been achieved, as was evidenced by the fact that 11 draft articles had been referred to the Drafting Committee.

92. Noting the discussion on the complex and technical issues raised in some of the proposed 33 draft articles on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in chapter VII of the report, he said that his delegation welcomed the extension of liability to the "global commons", and felt that ways should be found to attach

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more importance to protecting the environment under that item. It regarded the first of the two policy questions raised in paragraph 531 of the report, namely, the introduction of the list of dangerous substances in the context of a significant risk, as being unduly restrictive, but took a positive view of the notion that liability should be incurred by the State of origin of transboundary harm. In the latter case, however, the liability should be residual, and only if the recourse by the innocent victim against the private operator did not provide adequate remedy. In his delegation's view, the key consideration was that the innocent victim should not be left to bear the damage. His delegation was also receptive to the proposal made by the United Kingdom delegation for a status report on the item as a whole.

93. Section A of chapter VIII of the report dealt with the programme, procedures and working methods of the Commission and its documentation. His delegation had already stated its position on the priority to be given to specific items, and it agreed with the view that there should be a closer relationship between the Commission and the General Assembly and also the International Court of Justice. It would also be useful to have closer co-operation with regional bodies in the legal field. In addition, Cyprus supported the proposal to declare the 1990s as the Decade of International Law, a proposal which had originated from the Non-Aligned Movement. It was pertinent to mention, in that connection, that the Commonwealth, representing a principal legal system and accounting for nearly a third of the membership of the United Nations, was currently in the process of reviewing in depth its priorities and areas of concern for the coming decade and beyond. With that in mind, the International Law Commission would certainly benefit from a closer association with that aspect of the Commonwealth's activities.

94. In terms of the Commission's long-term programme of work, his delegation would warmly commend the suggestions made by the Working Group established at its forty-first session, which were set out in footnote 325 of the report. One of the suggestions was that the Commission could indicate to the General Assembly its readiness to receive from the Assembly requests for legal opinions on some pressing legal issues of international law, such as the question of the establishment of an international criminal jurisdiction. His delegation keenly anticipated the Commission's recommendations in that respect, and could suggest other possible areas which could appropriately be looked into by the Commission in that context, namely, the question of the implementation of United Nations resolutions and the legal consequences of their non-implementation, and that of the binding nature of Security Council resolutions.

95. Cyprus had accepted the compulsory jurisdiction of the International Court of Justice, and was prepared to have the legal aspects of the Cyprus question and, more particularly, Turkey's 1974 invasion and the consequences of the continuing occupation, authoritatively adjudicated by the highest judicial organ of the United Nations.

96. Recent developments had laid renewed emphasis on the need to apply the rules of international law and to implement United Nations resolutions, and had given

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small countries, such as his own, which had been victims of aggression and foreign occupation fresh hope that peace with justice could be achieved through the solution of long-standing regional problems within the framework of the United Nations.

97. Referring to the question of elections to the International Law Commission, his delegation wished to reiterate its view that the applicable rules for nominations and the time-limits for their submission should be adhered to in the interest of ensuring fairness and the maximum range of choice.

98. Mr. CRAWFORD (Australia) said that chapter VI of the Commission's report (A/45/10) dealt with an important topic, but one in which the relationship between the constituent instruments of particular organizations and the Commission's general draft articles was likely to present difficulties.

99. Referring to the draft articles considered by the Commission at its most recent session, he said that the phrase "when the latter have accepted them" in draft article 2, paragraph 1, appeared to introduce a requirement of recognition of international organizations through the obscure and imprecise criterion of "acceptance". What would in fact constitute "acceptance" for that purpose? The requirement threatened to introduce elements of controversy which were all the more undesirable as the draft articles applied only to international organizations of a universal character. A requirement of specific acceptance by States was contrary to the notion of objective legal personality adopted by the International Court of Justice, and thus would be a regressive step. It should also be noted that the provisions of the draft articles did not deal directly with the central issue of legal personality in the domestic law of non-member States. Draft article 5 was concerned solely with "legal personality under international law and under the internal law" of member States. Accordingly, while draft article 5 retained its limited scope, there was even less justification for an "acceptance" requirement in paragraph 1 of article 2.

100. His delegation's second comment related to draft articles 7 and 8, which dealt with the jurisdictional immunity of international organizations and their premises. In his delegation's view, those provisions required further detailed study on the part of the Commission. Among the more superficial difficulties raised by the draft articles was the fact that, under article 7, it was not possible for an international organization to waive its immunity from execution: such a provision contradicted the principle of consent and raised the question why an express waiver, authorized by the competent organization, should be ineffective.

101. The underlying issue, however, was whether international organizations should continue to enjoy absolute immunity, despite the changes which had occurred in the field of State immunity. It seemed extremely strange that States could, through an international organization they had set up, enjoy immunity with respect to transactions which, had they performed them separately, would not be covered by State immunity. The effect would be that third parties dealing with the organizations would bear the risk of default by some of the States parties, or of

(Mr. Crawford, Australia)

internal difficulties within a particular Organization which the States parties were in a position to control. Historically, the immunity of international organizations had developed by analogy with diplomatic immunity, and international organizations had largely had delegated and representational functions. Doubts had even been entertained as to the separate legal personality of international organizations. The current situation was very different, in that there were more international organizations than States, and those organizations were able to engage in transactions, including those of a commercial and financial nature, in their own right. Some of those transactions, if carried out by States, would no longer be the subject of jurisdictional immunity.

102. There should at least be some recognition of the need to protect third parties in their dealings with international organizations. The rather vague reference to "the functional requirements" of the organizations in draft article 11 did not go far enough, since it was merely suggested as a basis for waiver by the organization of the immunity confirmed by other draft articles. Such waivers could take into account any relevant matters, whether or not they related to "functional requirements".

103. His delegation agreed with the views expressed by the representative of Germany with regard to the working methods of the Commission. It also supported the call for a mid-term review of topics.

AGENDA ITEM 144: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/45/L.3, L.4)

104. Mr. TIONGSON (Philippines) said that, had his delegation been present for the voting on draft resolutions A/C.6/45/L.3 and L.4, it would have voted in favour of them.

105. Daw HLA MYO NWE (Myanmar) and Mr. LISWANISO (Namibia) said that, had their delegations been present for the voting on draft resolution A/C.6/45/L.4, they would have voted in favour.

The meeting rose at 1 p.m.

UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
37th meeting
held on
Friday, 9 November 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 37th MEETING

Chairman:	Mr. VAN DE VELDE (Vice-Chairman)	(Netherlands)
later:	Mr. MIKULKA (Chairman)	(Czechoslovakia)

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In the absence of the Chairman, Mr. van de Velde (Netherlands), Vice-Chairman, took the Chair.

The meeting was called to order at 3.15 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. AL-BAHARNA (Bahrain), noting that some members of the International Law Commission had expressed doubts as to the usefulness and the necessity of codifying the topic of relations between States and international organizations, said that it was now too late to raise such doubts. Having received the mandate of the General Assembly, the Commission had no choice but to proceed with the item. Besides, the Special Rapporteur had pointed out (A/45/10, para. 427) that there were many gaps to be filled and problems to be solved with respect to the item under consideration. His delegation shared that opinion. It was also aware that it would not be easy to fill those gaps, as each international organization had its own régime. The Commission should therefore be circumspect in prescribing general norms governing international organizations.

2. With respect to draft article 1, his delegation thought that regional organizations, which were by definition distinct from universal organizations, should be expressly excluded from the scope of the draft articles. It thought that paragraph 2 should be retained, except for the phrase "or the internal law of any State", which, in its view, was outside the purview of the draft articles.

3. His delegation shared the opinion of some members of the Commission regarding the use of the words "without prejudice to" and "are without prejudice to" in draft articles 3 and 4. In its view, the relationship between the draft articles and similar agreements should be regulated by the rules of treaty law, in particular the 1969 Vienna Convention on the Law of Treaties. It would therefore like for the Commission to review the text of draft articles 3 and 4 for the purpose of removing the ambiguity created by that expression.

4. His delegation agreed with the members of the Commission who thought that the wording of draft articles 5 and 6 (legal personality of international organizations) did not distinguish clearly between the legal personality of international organizations under international law and under internal law. It also believed that the consequences of legal personality could not be determined once and for all, as draft article 5 attempted to do.

5. His delegation was afraid that draft article 7 (immunity from legal process of international organizations and their property, funds and assets) might contradict the provisions of the constituent instruments of international financial institutions such as the International Bank for Reconstruction and

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(Mr. Al-Baharna, Bahrain)

Development (IBRD), the International Finance Corporation (IFC) and the International Development Association (IDA), which conferred only limited immunity. On the other hand, it had no objection to the immunity of property. Consequently, it suggested that draft article 7 should be divided into two parts, the first providing immunity from legal process in accordance with the relevant norms of the constituent instruments and the second providing immunity for property, funds and assets. As for waiver of immunity, his delegation would like the wording to be strengthened and suggested that the sentence "It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion" should be replaced by "Waiver of immunity from legal process shall not be held to imply waiver of immunity in respect of the execution of the judgement or order, for which separate waivers shall be necessary."

6. The provisions of draft article 8 regarding the inviolability of the premises of international organizations should be strengthened. The practice of States reflected the doctrine that inviolability meant not only that States were required to refrain from entering the premises of an international organization, but that they were also under the obligation to protect those premises. The formulation proposed in draft article 8, paragraph 1, differed from that of article 22 of the 1961 Vienna Convention on Diplomatic Relations ("The premises of the mission shall be inviolable"), which his delegation preferred, because the phrase "used solely for the performance of their official functions" restricted the principle of inviolability of international organizations. It would therefore like the Commission to reconsider the text of draft article 8, paragraph 1. It also urged the Commission to specify in the text that no agent of the host State might enter the premises of an international organization without its consent.

7. In the opinion of his delegation, article 9 went into too much detail. While it agreed with the principle that international organizations ought not to become a refuge for fugitives from justice of the host country, it did not see the need to include the category of persons wanted on account of flagrans crimen, since that concept might not be the same in the legal systems of all countries. It would also like to see the last phrase ("or against whom a court order or deportation order has been issued by the authorities of the host country") replaced by a phrase such as "or against whom a deportation order has been issued by the courts of the host State", which would be adequate to protect the interests of the host country.

8. Lastly, his delegation considered draft article 11 pointless, since it would introduce an element of uncertainty as to the scope of article 10. Also, in individual cases, it might be difficult to define the nature and scope of the "functional requirements" to be taken into consideration in limiting the provisions of article 10 (a) and (b).

9. Mr. MOMTAZ (Islamic Republic of Iran) said that, with the current term of the members of the Commission drawing to a close, the question of planning the future work of the Commission took on particular importance. With respect to the programme of work that the Commission had established for itself, highest priority should continue to be given to the draft Code of crimes against the peace and

(Mr. Momtaz, Islamic Republic of Iran)

security of mankind. Rapid implementation of that Code would contribute to maintaining international peace and security and would create favourable conditions for the success of the United Nations Decade of International Law.

10. With respect to the Commission's long-term programme of work, his delegation wished to make a few observations on the criteria to be used in choosing new topics. In its view, any operation of gradually codifying and developing international law should consist of adapting existing law to new realities. Given the growing economic disparities among peoples, there was an obvious need to develop legal instruments that would ensure economic co-operation and development. The report on the activities of the Planning Group of the Enlarged Bureau went in that direction. His delegation welcomed the Group's recommendation to give priority to "topics designed to provide practical answers to current issues of legal policy in various areas of international life" (A/45/10, note 325, para. 2), in particular the legal aspects of economic development.

11. While it was still too early to propose specific topics, his delegation emphasized that the real prospects for the success of codification should be taken into account so that the convention drafted would have all possible chance of entry into force within a reasonable amount of time. The negative consequences and uncertainties that failure of the codification process could have for the law in question should be stressed.

12. Regarding working methods of the International Law Commission, the role of the Drafting Committee should be emphasized. Intensification of the work of that Committee could increase the Commission's efficiency and could alleviate the problems resulting from increased membership. That recent reform, a fulfilment of the aspirations of the developing countries, might overburden its mechanisms, however. A meeting of the Drafting Committee between regular sessions of the Commission could facilitate agreement on acceptable language.

13. The need for closer co-operation between the International Law Commission and States Members of the Organization should also be stressed. In that regard, to make its debate more effective, the Commission should request more regularly the opinion of Sixth Committee delegations on specific questions.

14. His delegation had no doubt that, through its unflagging efforts for the progressive development of international law, the International Law Commission would make a valuable contribution to achievement of the fundamental objectives of the United Nations Decade of International Law.

15. Sir Arthur WATTS (United Kingdom) said that the doubts already expressed by his delegation regarding the matter of relations between States and international organizations still remained after detailed study of the Special Rapporteur's fourth report on that topic. Functional requirements of organizations should be one of the main criteria, if not the only criteria, for determining the extent of privileges and immunities to be accorded to international organizations. Yet each international organization had its own characteristics, aims and functions,

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requiring particular privileges and immunities. It was useless to attempt to establish uniform rules applying to international organization of a universal character. Work on that topic should continue only in the direction of developing guidelines and recommendations which States and international organizations might adopt as they saw fit.

16. Concerning organization of work of the International Law Commission and the Sixth Committee, he agreed in general with the thrust of the report of the Working Group considering the long-term programme of work, and in particular the recommendation that topics of practical interest should have priority over theoretical topics and that new topics should be limited in scope, if possible, so that they could be concluded swiftly.

17. Selection of topics was only the starting point: it would be appropriate also to consider the conclusion of work on a given topic in the International Law Commission also. The Commission, and the Sixth Committee as well, should not automatically assume that the most useful outcome was a convention. In many cases, it would be much more valuable to conduct a study, formulate guidelines or state applicable principles.

18. As for working methods, shortcomings could be found in three areas: within the Commission, in the relationship between the Commission and the General Assembly (in practice, the Sixth Committee) and, finally, within the Sixth Committee. The working methods of the Commission had three main characteristics: the length of time spent on some topics, the sometimes excessively theoretical nature of that work, which in practice was not always very useful to foreign ministries, embassies and international organizations, and the modest number of articles submitted to the Commission on some topics over several years. The causes of those shortcomings were, without doubt, complex, but that was simply a statement of fact.

19. In its relationship with the International Law Commission, the Sixth Committee failed to play its proper role in three respects: it did not give the Commission formal guidelines to assist it in the consideration of a topic submitted; it did not give them a precise idea of a time period within which results were expected; and it did little to assist the Commission in setting priorities between the different topics on its agenda.

20. As for the report which the International Law Commission submitted to the Committee each year, it was both too full and too late, and its fullness led to its lateness. His delegation found it unnecessary to present in each report a detailed discussion of debates in the Commission at each stage of its consideration of a proposed draft article. Such discussions would be more appropriate in a summary record. In the second place, consideration and approval of such lengthy reports were time-consuming for the Committee. Finally, its work suffered because the report prompted comments, often long and detailed, which served little practical purpose at the stage at which they were offered.

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21. The role of the Committee with regard to the International Law Commission was, at the least, confused. In consideration of the draft Code of crimes against the peace and security of mankind, that confusion could be illustrated by four examples. First, the Committee considered draft articles without regard to the stage which the Commission itself had reached (proposals by the Rapporteur, articles approved by the Drafting Committee, articles approved at first reading, etc.). Yet the Commission's procedures differed at each of those stages, and it did not always have the opportunity to take into account the comments of the Committee.

22. Secondly, draft articles were discussed piecemeal, often without the Sixth Committee having the least idea of what the rest of the draft would contain. At the national level, if ministries for foreign affairs proceeded in the same way to draw up a draft treaty, it could be called professional negligence.

23. Thirdly, the Committee considered various draft articles without having a clear idea to whom its comments were addressed. Delegations tended to offer statements addressed to the world at large, while different audiences, whether Governments, the International Law Commission, the international legal community or national public opinion, called for different kinds of statements.

24. The fourth example was the confusion resulting from apparent failure on the part of delegations to keep clearly in mind the distinction between their role as Government representatives and the role of Commission members as legal experts. The Committee should not interfere with the expert role of the Commission but, on the contrary, should give it policy guidance.

25. Despite those criticisms, his delegation saw grounds for optimism. Firstly, to recognize the existence of problems was a step in the right direction, and many members of the Sixth Committee agreed that current arrangements could and should be improved. Secondly, the Decade which was beginning, and which was so important for international lawyers, offered a great opportunity to initiate the necessary changes, changes which could represent as valuable a contribution to the United Nations Decade of International Law as the formulation of new provisions of substantive law. Lastly, there was unanimity about the objective, which was to restore the Commission and the Sixth Committee to a central, effective and respected role in the legal work of the United Nations. With that objective in mind, his delegation wished to offer a number of suggestions.

26. Thus, the Commission should not include in its annual report any draft articles or any account of its deliberations until a complete set of articles had been adopted in first reading.

27. Failing that, the report should do no more than set out the text of the Special Rapporteur's proposed draft articles, but without any account of the discussion which had taken place.

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28. Before any complete text had been adopted in first reading, the Commission might, of course, seek guidance from the Committee, in which eventuality it should explain only as much of its discussions as might be necessary for the Committee to understand the issue.

29. The Committee should not comment until presented with a complete first text, while being ready to give guidance to the Commission on particular points.

30. If, contrary to his suggestions, the Commission's report contained an account of its discussions, it should be the firm rule of the Committee not to comment on the topic until the complete first reading text was available.

31. Government comments should wherever possible be in writing, and oral statements by delegations should be limited to broad issues of policy and points of substantial importance, where it was necessary for the Commission to be clearly informed of Governments' views.

32. Delegations should refrain from commenting in oral statements on points of textual detail. It would be useful to consider procedures under which Governments could submit in writing comments of relative detail on texts.

33. The Committee should be ready to ask the Commission to produce a rapid report or opinion on a subject of particular importance. The value of such a way of proceeding had been fully demonstrated in relation to the establishment of an international criminal court.

34. The Committee should make it the normal practice to indicate the time-frame within which the Commission should aim to submit an initial progress report providing an overall view of the direction a particular topic was taking.

35. The Committee should be ready to ask the Commission for a "state of the topic" report, so that it could contribute to work on a topic by ensuring that it evolved in directions which Governments were likely to find acceptable. The Committee would need to be prudent in requesting such reports, since their preparation might interfere with the conduct of the Commission's work on the topic in question.

36. In order to speed up its work, the Commission should be invited to consider ways in which initial studies could begin immediately after the General Assembly's autumn session, rather than waiting until the start of the Commission's annual session, six months later.

37. His delegation believed that adoption of its suggestions would improve the work of both the Commission and the Committee. The Commission's report would be substantially shorter, and so would the Committee's debates. All delegations, particularly those of smaller missions, would find their task more manageable.

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38. Mr. MICKIEWICZ (Poland) said that his Government, which had recently deposited with the Secretary-General the declaration provided for under Article 36, paragraph 2, of the Statute of the International Court of Justice for the purpose of recognizing the compulsory jursidiction of the Court, was ready to take a further step and accept in practice the new tendency to limit the immunity of the State from the jurisdiction of the courts of other States in certain well-defined circumstances.

39. With regard to the Commission's draft on the jurisdictional immunities of States and their property (A/45/10, chap. III), his delegation was prepared to accept the replacement, as the Special Rapporteur had done in paragraph 1 (c) of a newly combined article 2 (ibid., para. 168), of the concept of "commercial contract" by that of "commercial transaction". However, with regard to paragraph 3 of that article, it did not seem that the nature of a transaction should be the primary test for determining whether or not a transaction was commercial. It would be desirable also to take into account the purpose of a transaction, in order to separate the acts of the State de jure imperii from acts de jure gestionis. With regard to article 5, his delegation was in favour of the deletion of the phrase "and the relevant rules of general international law" (ibid., para. 169), the retention of which might lead to divergent interpretations. The new article 11 bis on segregated State property proposed by the Special Rapporteur (ibid., para 170) was useful.

40. Concerning the articles dealing with the exceptions to State immunities, care should be taken to ensure, since they departed from the long-established principle of absolute State immunity under international customary law, that they were particularly well balanced. His delegation had no objection to article 10 (original article 11, see A/CN.4/431, p. 20). Nevertheless, the scope of the concept of a "commercial transaction" was not very clear. Different definitions in that regard were used in the national legislations of Great Britain, Australia and Canada. With regard to article 12, dealing with contracts of employment (A/45/10, para. 175), his delegation shared the view of some other members of the Commission that labour law disputes, particularly between locally appointed employees and foreign diplomatic or consular missions, should be settled without violation of the immunity of the sending State under international diplomatic law. It would be difficult to accept the hypothesis that a State could be forced by the court of another State to employ, retain in its employment or re-employ a locally recruited employee. In such cases the rule of non-immunity could be applicable only in respect of quasi-governmental institutions such as cultural, scientific or tourist agencies, particularly those involved in commercial activities. With regard to article 13, his delegation endorsed the observations contained in paragraph 185 of the report. A much greater effort was needed to find a common denominator to reconcile the different views concerning the responsibility of the State to pay monetary compensation for personal injuries and damage to property caused on foreign territory. His delegation supported draft articles 14, 15, 16, 17, 18 and 19, as formulated by the Special Rapporteur, as well as the deletion of article 20.

41. Concerning the articles in Part IV on measures of constraint (ibid., para. 216, et seq.), he said that Poland was now in favour of the new tendency

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among developed countries to restrict State immunity from measures of constraint in respect of some categories of State property and was ready to support draft articles 21, 22 and 23, as provisionally adopted on first reading by the Commission (ibid., footnote 97). His delegation did not, however, regard as satisfactory the changes proposed in 1990 by the Special Rapporteur (ibid., footnote 99), since it considered that greater caution should be exercised in restricting State immunity in that regard. With that in mind, his delegation requested the retention, in subparagraph 1 (c) of the proposed new aritcle 21 of the phrase "[and has a connection with the object of claim, or with the agency or instrumentality against which the proceeding was directed]". It was essential to avoid a situation in which any State property used for commercial purposes might be subject to measures of constraint adopted by a foreign court. His delegation was fully in favour of the new article 23.

42. He wished to raise a number of general questions which required a clear answer if the Commission was to continue its work on the law of the non-navigational uses of international watercourses successfully (ibid., chap. IV). Firstly, although the Commission had stated that its intention was that the instrument that was being prepared should take the form of a "framework agreement" which would set forth basic legal principles and was intended to supplement specific agreements to be concluded between States, taking into account the specific features of a particular watercourse, the draft articles did not always reflect that approach. Moreover, different opinions continued to be expressed as to the meaning of the term "framework agreement". Secondly, he wondered whether the draft articles established a proper balance between the interests of watercourse States whose geographical situations with respect to the watercourse were not the same. It was sometimes difficult to reach a position on specific provisions because they did not make a distinction between contiguous and continuous international watercourses. For instance, in cases of joint institutional management (art. 26, ibid., footnote 123) and the regulation of international watercourses (art. 25, footnote 122), the situation regarding contiguous and non-contiguous riparian States was not the same. Thirdly, it had yet to be decided how the draft articles would apply to existing institutional arrangements (art. 26) and installations (art. 27). Fourthly, he wondered whether the draft articles on international watercourses were fully consistent with the Commission's work on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, for instance with regard to civil liability régimes for the compensation of victims.

43. Article 24 (ibid., footnote 120) properly reflected the principle of absence of priority among uses of international watercourses. A reference to that principle should, however, be included in the preamble to the draft articles. His delegation shared the view of the majority of members of the Commission, that article 26 on joint institutional management was one of the most important components of the draft articles, even if it might be regarded as going beyond the scope of a framework instrument. While it agreed with the general thrust of article 27 (ibid., footnote 124), it felt that the article should be limited to the protection of installations, since, as the representative of Brazil had rightly observed, the protection of water resources was indistinguishable from the

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protection of watercourses, which was the very object of the draft articles and was contemplated in several provisions.

44. The reluctance of some members of the Commission to include in the draft articles an article on the status of international watercourses and water installations in time of armed conflict (art. 28, ibid., footnote 124) was understandable, since such a provision could be construed as an attempt to alter the delicate balance achieved in the 1977 Protocols Additional to the Geneva Conventions. A final decision would depend on the wording of the provision. For example, consistency with existing law could be achieved by a reference in the text of the draft articles, or better still in the preamble, to the rules of international law governing armed conflicts.

45. With regard to annex I on implementation of the draft articles (ibid., footnote 126), his delegation shared the view that the provisions therein did not correspond to the machinery which should be created by the draft articles provisionally adopted by the Commission. Although the Standing Committee of the International Atomic Energy Agency had examined in depth the relationship between civil and State liability régimes, no concrete proposal had yet been made for a comprehensive system of compensation for nuclear damage based on a combination of the two régimes. His delegation wished to express some reservations with regard to the articles in the annex themselves: article 1 contained a definition which could be incorporated in the article on the use of terms; articles 2 and 5, which did not, strictly speaking, deal with implementation, belonged rather in the part on planned measures; articles 3 and 4 embodied principles that could be expressed in Part II, "General principles"; article 6 could be deleted, since the question of jurisdictional immunities was dealt with under another topic; article 7 had no place in a framework agreement, since it was difficult to see how all the Parties to the draft articles could participate directly in the application of the draft to a particular watercourse (the conventions mentioned by the Special Rapporteur as containing provisions for a conference of the Parties were not, moreover, framework conventions comparable to the draft articles); finally, article 8 was also superfluous, since the Vienna Convention on the Law of Treaties had already laid down the general procedure concerning amendments (in addition, that aspect was usually covered by the final clauses).

46. Despite those few critical remarks concerning annex I, his delegation wished to pay a tribute to the Special Rapporteur, and to express the hope that the Commission would be able to complete the first reading of the draft articles in 1991.

47. The outline (ibid., para. 470) presented by the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (ibid., chap. VII) was extremely helpful for an understanding of the topic as a whole and enabled one to have a clearer view of its relationship to other topics such as State responsibility and the law of the non-navigational uses of international watercourses.

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48. With regard to the question whether the draft articles should include a list of dangerous substances in order to clarify the concept of significant risk, his delegation believed that general objective criteria would be preferable: a list was inappropriate in a framework convention; it would have the drawback of having to be updated annually by experts in various fields; and, whether or not it was exhaustive, it would tend to narrow the scope of the topic and to shift the emphasis from liability for causing harm to liability based on carrying out activities involving risk.

49. His delegation considered that the draft articles should provide for the liability of the State of origin for transboundary harm caused by activities carried out under its jurisdiction or control by private persons. In fact, the State alone had the authority to regulate activities carried out in its territory and to ensure that they did not cause harm to other States.

50. His delegation shared the view of those members of the Commission who considered that chapter IV (ibid., footnote 315) of the draft articles should clearly state the obligation to pay compensation for transboundary harm, instead of emphasizing, as it now did the obligation to negotiate compensation.

51. Finally, the chapter of the sixth report of the Special Rapporteur (A/CN.4/428/Add.1) on liability for harm to the environment in areas beyond national jurisdictions (global commons) represented a commendable effort to seek a positive solution to extremely serious problems which threatened the very survival of mankind. While recognizing the complexity of the issue, his delegation strongly encouraged the Commission to continue its efforts on the matter. In that respect, the revival of an old institution of Roman law, *actio popularis*, could be considered.

52. Mr. THAHIM (Pakistan) said that his delegation was satisfied with the progress of work on the law of the non-navigational uses of international watercourses (A/45/10, chap. IV) and hoped that the Commission would be able to conclude its first reading of the draft articles in 1991. For Pakistan, which suffered from an acute water shortage, the non-navigational uses of watercourses were vitally important. There must be an equitable balance between the rights of downstream and upstream riparian States, and watercourse States must co-operate with each other to mitigate water-related hazards and harmful conditions and to ensure the protection of watercourses.

53. He had noted with interest the principle stated in article 24 (ibid., footnote 120) that in the absence of agreement to the contrary, neither navigation nor any other use enjoyed an inherent priority over other uses, and welcomed the principle of equitable utilization and the provision (art. 24, para. 2) that, in the event that uses conflicted, equitable utilization would be established in accordance with articles 6 and 7.

54. With regard to article 25 (ibid., footnote 122), his delegation agreed with the Special Rapporteur that the term "regulation" should be clearly defined. The Commission should pursue its consideration of the provisions of that article and

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should clearly set forth the legal obligations of each State with regard to the regulation of international watercourses.

55. The idea of establishing joint organizations for the management of international watercourses was very interesting, and the importance of management on an agreed basis could not be over-emphasized. However, in addition to the requirement in article 26 (ibid., footnote 123) for consultation and co-operation among watercourse States, there should be an obligation, in the event of conflicts among the socio-economic interests of watercourse States, to negotiate in order to arrive at a just and equitable solution.

56. Paragraph 2 of article 27 (ibid., footnote 124), instead of merely asking watercourse States to enter into consultations with a view to concluding agreements or arrangements concerning the establishment of safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts, should make it obligatory for such States to use their best attempts to ensure that protection. The article should provide for an obligation to prohibit not only the contamination of water resources but also any attempts to cut off the water supply of other watercourse States, to dry up springs or to divert rivers from their courses. Such acts, whether wilful or negligent, should involve the strict liability of the State.

57. Some of the provisions of annex I on the implementation of the draft articles (ibid., footnote 126) would require changes in national legislation and went beyond the limits of a framework agreement. The Commission should undertake further examination of the issue.

58. On the topic of jurisdictional immunities of States and their property (ibid., chap. III), his delegation hoped that, despite the divergence of views between States which subscribed to absolute sovereign immunity and those which subscribed to restrictive sovereign immunity, the Commission would be able to formulate proposals leading to a resolution of that difficult issue. Pakistani legislation departed from the traditional concept of absolute immunity and restricted immunity to sovereign acts.

59. In regard to the draft Code of crimes against the peace and security of mankind (ibid., chap. II), he regretted that the word "abetting" had been included in the definition of complicity in article 15 (ibid., footnote 27) because, like conspiracy and attempt, abetting was an offence in itself. It should therefore be defined in a separate article. He supported the view that illicit traffic in narcotic drugs should be included among the crimes covered by the Code. However, that would serve no purpose unless the crime was defined with precision and the abetting of drug traffickers was also made a crime. Collective efforts must be undertaken by all countries to eliminate that scourge. In Pakistan, a law had already been enacted (Prohibition Order 1979) to impose penalties up to life imprisonment for possessing, manufacturing, transporting, exporting, importing, selling and trafficking in narcotics. The 1930 Drug Act had been amended in 1983, and again in 1987, to enable the courts to impose penalties up to life imprisonment and confiscation of the assets of those convicted of drug trafficking.

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60. Mr. EL HUNI (Libyan Arab Jamahiriya) said that, in the draft Code of crimes against the peace and security of mankind, the Special Rapporteur had rightly treated complicity, conspiracy and attempt as separate international crimes. Attempt always implied an intention, and the common determination to commit an act prohibited by the Code constituted a crime in itself, although it was for the competent courts to determine to what extent the provisions of the Code applied in each specific case. His delegation therefore had no difficulty in accepting draft articles 15, 16 and 17 as presented by the Special Rapporteur. It was also aware of the importance of the question concerning the establishment of an international criminal jurisdiction to ensure the implementation of the provisions of the Code. Under the rule nullum crimen sine lege, that jurisdiction should have competence over the crimes defined in the Code without limiting in any way the applicability of existing international conventions, whose provisions should as far as possible, be included in the text of the Code.

61. With regard to the competence of the jurisdiction ratione personae, the question of extending the scope of the draft Code to States should be left open, as should the possibility of extending it to legal entities other than States, for such crimes as drug trafficking. As to the nature of that competence, the creation of an international criminal court with exclusive jurisdiction seemed to be the solution that would best guarantee the independence of that court, which would constitute a new United Nations international criminal justice organ.

62. His delegation welcomed the Commission's definition of illicit drug trafficking as a crime against humanity because, in addition to fostering instability and terrorism at both the national and the international levels, such trafficking endangered the very survival of humanity. The Commission had also been right in entitling article 16 "International terrorism" in order to show clearly that it concerned terrorism organized and committed by one State against another State, in other words, a form of terrorism that endangered international relations. Finally, the text of draft article 18 made a positive contribution to the elaboration of the Code and supplemented other pertinent international instruments such as the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

63. The Sixth Committee must constantly stress the importance of the question of the jurisdictional immunities of States and their property; it was therefore necessary to indicate clearly in the text of the future instrument any limitations on the immunity of States and to base those limitations on objective considerations that were likely to gain universal acceptance. His delegation agreed with the suggestion, mentioned in Part III of the draft articles, that the title "Cases in which State immunity may not be invoked before the court of another State" would be preferable. The provisions of draft article 12 seemed logical and his delegation had no particular difficulty in accepting them. It shared the opinion expressed in paragraph 181 of the report that recruitment itself could not be challenged in court for the State's freedom to decide whether or not to hire or to renew employment should not be questioned. With respect to personal injuries and damage to property (art. 13), his delegation felt it was important to add another paragraph specifying that the provision did not affect any rules concerning State

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(Mr. El Huni, Libyan Arab Jamahiriya)

responsibility under international law. It also considered that there was no contradiction between draft article 13 and the Vienna Convention on Diplomatic Relations. Finally, articles 21, 22 and 23 on State immunities from measures of constraint in respect of their property gave the text a legal homogeneity and took into account in a balanced way the interests of all States.

64. With regard to chapter V of the Commission's report (State responsibility), his delegation approved of draft article 8; it preferred the title "Compensation" to "Reparation by equivalent", and hoped that alternative (a) of paragraph 1 would be retained. Article 10 should be reviewed with the greatest care, particularly because of the importance of the rules of international law concerning human rights and the environment. Juridical injury should be maintained, in addition to moral damage or injury as a justification for the request for, and award of, satisfaction. It was also in favour of drafting a separate article for guarantees of non-repetition and considered, as did the Special Rapporteur, that the importance of the obligation breached and the degree of negligence of the State committing the internationally wrongful act should be taken into consideration in the form or forms of satisfaction.

65. Turning in conclusion to chapter VII of the Commission's report, his delegation considered that international liability for injurious consequences arising out of acts not prohibited by international law should be extended to areas beyond the national jurisdiction of States. It was in favour of drawing up a list of substances which were inherently dangerous in that certain activities using those substances were liable to cause transboundary harm.

66. Ms. DAW HLA MYO NWE (Myanmar), referring to the draft Code of crimes against the peace and security of mankind, and in particular the question of the establishment of an international criminal jurisdiction, said that the Commission was to be congratulated for its in-depth examination of the topic, which it had undertaken in response to the request in General Assembly resolution 44/39. Her delegation had taken note of paragraphs 117 to 121 of the Commission's report, and had observed in particular that, while the Commission felt that certain aspects of developments in international relations and international law led to the conclusion that it would be possible to establish an international criminal court, it was also aware that, for some States, the time might not be ripe to create such a jurisdiction. The Commission also stressed in its report that the system of universal jurisdiction already existed for a large number of crimes and that, in some cases it was being applied by numerous States, and that prosecution was being carried out effectively in national courts. Her delegation concurred in the view of the Commission that proposals for an international court must take into account the danger of disrupting the operation of the existing system, which had so far proved satisfactory. Furthermore, some States were legitimately concerned that the establishment of such a court might result in curtailment of national sovereignty, and such a concern should be fully addressed.

67. The Commission had taken the view that there were three options, mentioned in paragraph 155 of its report, with regard to the competence which the international

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criminal court might have. While it had not arrived at a definitive opinion, her delegation considered that the first two options merited close study. In terms of competence, the Commission had restricted the scope of the draft Code to individuals. Given the divergent views on the question, her delegation concurred with the Commission's opinion that establishment of the court would be successful only if it gained wide support from the international community.

68. The Special Rapporteur for the topic of International liability for injurious consequences arising out of acts not prohibited by international law was to be congratulated on having proposed an almost complete set of draft articles. With regard to the scope of the subject, the approach taken by the Special Rapporteur and most members of the Commission was that the articles should apply to activities involving risk as well as to activities with harmful effects, and that it would be preferable to consider those activities together, since they had much in common in terms of their legal consequences. While it had no strong opinion on the matter, her delegation took the view that the scope of the topic would in no way be narrowed by treating the two aspects together. Similarly, and with the same aim of avoiding narrowness of scope, the list of dangerous substances proposed by the Special Rapporteur should be regarded as illustrative rather than exhaustive.

69. The definitions in article 2, "Use of terms", should be regarded as provisional, in view of the differing opinions within the Commission on some terms, but also because the topic was relatively unexplored, and it might be necessary to amend them as work on the topic proceeded.

70. The possibility of expanding the scope of the draft articles to the "global commons" required careful study and should be approached with caution. The issues it raised were complex and might hinder progress on a topic that was already complicated.

71. As for the topic of Relations between States and International Organizations, her delegation had noted with satisfaction that article 9 enjoyed the support of several members and considered that the provision was justified by the functional approach to privileges and immunities and served as a safeguard against possible abuses.

72. Finally, in view of the magnitude and complexity of the subjects on its agenda, the length of the Commission's sessions should not be changed.

73. Mr. NASIER (Indonesia) said that, notwithstanding the lofty ideals which served as the basis of the draft Code of crimes against the peace and security of mankind, his delegation had certain misgivings regarding adoption of the existing text by all States. Complicity, conspiracy and attempt should not be treated as separate offences, but should be examined in relation to each of the crimes enumerated in the draft Code. Furthermore, while articles 15, 16 and 17 attempted to formulate definitions on complicity, conspiracy and attempt as "crimes defined in this Code", there was no definition of what constituted an international crime. The difficulties to which that complex political issue gave rise could be resolved

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by recognizing international conventions as the primary source for the identification of international crimes. A number of issues relating to the binding nature and enforceability of the legal sources invoked, such as custom and general principles, could thus be avoided. It was therefore essential for the Commission to rely on conventional international law as a basis for developing a theory in order to achieve legal certainty. However, it must not be forgotton that there had never been a definitive list of international crimes, nor had there ever been a conclusive theory as to the definition of an international crime.

74. Turning to draft articles X and Y, relating to illicit traffic in narcotic drugs as a crime against the peace and security of mankind, his delegation considered that the new version thereof was ambiguous for the following reasons: firstly, the text failed to specify that the drugs were used for an illegal or unlawful purpose; and secondly, because the provision did not indicate what exactly constituted traffic "on a large scale". The Commission should therefore be more precise in drafting those provisions. At all events, it was unnecessary to deal with the topic in the draft Code, the national legislation and judicial systems of States effectively punished crimes related to drug trafficking. From a legal point of view, it was the responsibility of the State on whose territory the crime was committed to institute proceedings. Furthermore, between 1912 and 1982 such crimes had been the subject of 15 international conventions, of which he gave several examples. As a signatory of the 1988 International Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Indonesia was profoundly committed to the international campaign against illicit trafficking, and was in the process of streamlining its national legislation in order to bring it into line with the provisions of the Convention. It was more effective to deal with such offences under domestic legislation and it was premature to tackle them at the international level, if only because of the current lack of an international mechanism to punish those engaged in such traffic.

75. With regard to the establishment of an international criminal jurisdiction, his delegation had fundamental doubts regarding absolute universality, which made it possible for States to impose their political views through criminal prosecution. It was hardly realistic to imagine that an international criminal court could have coercive powers when deciding on the conduct of States in matters that were in essence politically controversial.

76. The International Court of Justice did not have criminal jurisdiction, but if the States Members of the United Nations wished it to have such jurisdiction, they could so decide, and proposals to that effect had occasionally been made. Even if the Charter was not modified, the Court did have the power to deal with issues of international criminal law if those issues were submitted as damage actions or cases calling for injunctive relief. However, recent history had demonstrated that international criminal law was not self-executing or truly enforceable, even when the International Court of Justice had ruled. Attempts to establish a coercive sanction apparatus to enforce obligations imposed by international law presupposed the existence of an international authority which was superior to sovereign States. Practical considerations would seem to favour more flexible and less

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onerous systems that were more compatible with international co-operation, which must allow States to reach a mutual understanding with regard to international problems. Several issues also arose in connection with the legal force of judgements, penalties, implementation of judgements and financing of the court. At present, some serious thinking ought to take place before an international court having competence in accordance with one of the three models described in the report of the International Law Commission (A/45/10, para. 155) was established. It would be advisable to complete the draft Code before considering the establishment of an international criminal court.

77. With regard to the law of the non-navigational uses of international watercourses, his delegation endorsed the framework agreement approach, which consisted of enunciating general principles and allowing the States concerned to adopt measures specific to their own circumstances and requirements, given the diversity of international watercourses. In addition, the many treaties on navigation, pollution and power production should be studied with a view to deducing the rules in question. The general rules to be formulated by the Commission should be more than residual principles, since they would be based on customary law. The international community, particularly the developing countries, increasingly felt a need for rules for the reasonable and equitable use of international watercourse systems. Moreover, water shortages and the general impairment of water quality had made the problem more pressing.

78. Draft article 24 reflected the current view that watercourses were no longer used solely for navigation. Accordingly, there was general recognition that the purpose of article 24 was to indicate that no use should have priority over others. The principle of equitable utilization, well established in international law, also implied that no type of use was superior to another and that the reasonableness of a given type must be determined in the light of a great number of factors in each particular case. Those factors could include geography, climatic conditions, the economic and social needs of individual riparian States, the existence of alternative means, including the availability of other sources to satisfy needs, and the possibility of compensation to one or more riparian States in the context of negotiations between them.

79. His delegation endorsed the wording of article 25, as it considered that the regulation of watercourses could be undertaken regionally or bilaterally as well as through international agreements. That article, which provided for joint institutional management of watercourses, went beyond the scope of a framework agreement. He recommended that, for the time being, individual States, taking into account their own situation and needs, should be considered to be in a better position to define the functions of various forms of management in the context of bilateral watercourse agreements.

80. The provisions of article 27, relating to the protection of watercourses, were welcome. It was essential, however, that that article should focus on the protection of watercourses and not of related installations, facilities or other works. The latter required further clarification and should be dealt with in a

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(Mr. Nasier, Indonesia)

separate article. The provisions of article 28, on the status of international watercourses in time of armed conflict, should be reviewed in the light of established rules of international law governing armed conflicts.

81. On the issue of jurisdictional immunities of States and their property, the Commission must draft provisions that reconciled the two concurrent theories prevailing in that area, namely, the concept of absolute immunity and the concept of limited immunity. Generally speaking, sovereign States should be immune from legal proceedings, regardless of whether their activities were of a public or a private character. However, a key element that should be taken into consideration when making that distinction was the clauses that were generally included in bilateral, regional and global agreements governing restrictions on jurisdictional immunities of States and their property.

82. Mr. VAN DE VELDE (Netherlands) said that the framework agreement format which the Special Rapporteur had chosen for the draft articles on the law of the non-navigational uses of international watercourses was that of a general instrument containing principles and other general rules which riparian States must supplement according to the needs and other relevant factors associated with a particular watercourse. Thus while accepting in principle article 24 as it related to the various uses of a watercourse, his delegation wished to note that situations differed from one watercourse to another and that, in certain cases, navigation could be considered to be the priority use of a watercourse.

83. His delegation also endorsed the duty of riparian States of a watercourse to co-operate, which was set out in article 25. The question remained, however, as to what that article added to article 9, which contained the general obligation for riparian States to co-operate in order to "attain optimum utilization and adequate protection of an international watercourse [system]". As worded, paragraph 1 of article 25 raised the question of the form and scope such co-operation should have. To the extent that the reference to the identification of needs and opportunities for the regulation of international watercourses might be interpreted in too restrictive a sense, he wondered whether paragraph 2 of the article should be retained.

84. His delegation was not opposed in principle to article 27, concerning the status of international watercourses and water installations in time of armed conflict; however, further reflection as to how the article related to existing rules of international law on armed conflict, and particularly as to whether the term "inviolable" was appropriate in relation to watercourses, was required. Articles 3 and 4 of annex I contained very important rules concerning recourse under domestic law and equal right of access of any person in another State who had suffered appreciable harm or was exposed to a significant risk thereof. In view of the importance of those rules, one might ask whether it would not be preferable to include them in the main body of the text rather than relegating them to an annex.

85. With regard to the draft Code of crimes against the peace and security of mankind, he concurred with the Commission's conclusion that it was desirable to

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(Mr. Van de Velde, Netherlands)

establish a permanent international criminal court as part of the United Nations system, and that such a court would be successful only if it was widely supported by the international community. It might be asked, however, whether it was not premature to deal with the matter; in any case, it would be counter-productive to establish an over-ambitious and unrealistic mechanism. At the same time, he recognized that there might be a need for uniform prevention and punishment of crimes against peace, the threat of aggression, intervention and other acts constituting crimes against the peace and security of mankind. However, the establishment of a criminal court with exclusive jurisdiction over all crimes mentioned in the draft Code seemed not only ambitious but unnecessary for achieving that purpose.

86. The difficulties mentioned in the Commission's report with regard to concurrent jurisdiction between an international criminal court and national courts argued strongly against such a solution. There was no guarantee of a uniform application and the risks of different standards being applied were very great. The most realistic approach might be for the future court to be competent to give either binding or advisory legal opinions. Even in that alternative, there was a significant difference between binding and non-binding legal opinions, as the former required a much more radical elaboration than the latter. As to the jurisdiction of the court ratione personae, the desirability of establishing an international criminal jurisdiction competent to try individuals should be judged in the light of the offences justiciable under such jurisdiction.

87. His delegation could not endorse the two draft articles characterizing illicit drug trafficking as a crime against peace and a crime against humanity, as proposed by the Special Rapporteur, whether in the context of the codification or even of the progressive development of international law. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which strengthened international co-operation in the prevention and punishment of such traffic, did not go so far as to characterize illicit drug trafficking as a crime against humanity. The characterization of "crime against peace" or "crime against humanity" had so far been reserved for crimes such as aggression, genocide or war crimes. In order to warrant such a characterization, the offence must be of a serious nature and be defined with precision. As stated by the Commission in paragraph 77 of its report, such trafficking could affect international peace by giving rise to a series of conflicts, for example, between the producer or dispatcher State, the transit State and the destination State. Any transboundary traffic organized on a large scale did not necessarily meet the criteria for characterization as a crime against peace or a crime against humanity. While the international community should give the highest priority to the suppression of illicit drug trafficking, the concepts of a crime against peace or a crime against humanity should not be extended to the situations under consideration.

88. Mr. SZEKELY (Mexico), referring to the law of the non-navigational uses of international watercourses, said that the principle of absence of priority among uses of an international watercourse, as expressed in draft article 24, was an extremely sensitive issue which must be examined carefully in view of the

(Mr. Székely, Mexico)

consequences which its general application might have. To apply that principle would be tantamount to disregarding the fact that each watercourse, whether navigable or not, had its own characteristics. Therefore, the draft articles should not lay down general rules, especially in the case of transboundary natural resources which, as such, were meant to satisfy human needs in watercourse States. Nevertheless, it was unquestionable that an order of priority among those needs must be established, so as to give priority to satisfaction of the most urgent. For example, it could hardly be denied that water supply for satisfactory household and agricultural needs was the first priority of a riparian district dependent on a watercourse. Accordingly, the question of priority among uses of a watercourse should be considered on a case-by-case basis; any general provision pertaining to a treaty on the subject could become a serious obstacle.

89. Furthermore, there was a glaring contradiction between the principle of the absence of priority among uses of a watercourse and draft article 25, paragraph 1, which was of noteworthy clarity and simplicity. In order really to be able to co-operate in identifying needs and opportunities for regulation of international watercourses, as provided for in that paragraph, watercourse States must be released from the implicit obligation laid down in draft article 24. The same positive observation applied to draft article 25, paragraph 2.

90. Draft article 26 seemed to confuse the concept of "management" of a watercourse with that of "joint organization" for its management. In seeking to define the concept of "management" in paragraph 2, the wording proposed gave the impression that such "management" would consist of carrying out the functions which were in fact meant for the joint organization intended to provide for management. Accordingly, he suggested that the first sentence of paragraph 2 should be deleted and that paragraph 1 should be reformulated as follows:

> "Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of an organization or a joint institutional mechanism for the management of an international watercourse [system], as follows:"

and that the management functions to be carried out by such an organization or institutional mechanism should then be enumerated. He was referring to the concept of a joint institutional mechanism, as it was more flexible than that of an organization; such a mechanism would necessarily have an international character and might be either multilateral or bilateral. In addition, he suggested that some concepts presented by previous Special Rapporteurs should be taken up again, such as the idea that the provision in question should be applicable, where necessary, to existing institutional mechanisms so as to strengthen them. Lastly, he suggested that draft article 26 should establish a link between the agreement which must obviously be concluded in order to establish the joint mechanism and the so-called watercourse system agreements to which the initial draft articles referred, because it would be advisable, if not essential, for such agreements to be negotiated simultaneously.

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(Mr. Székely, Mexico)

91. As to draft article 27, even though its title referred only to the "protection" of water resources and installations, it also dealt with the setting up, operation and maintenance of such installations. The title, therefore, should be changed accordingly. Moreover, in paragraph 1 of the article, the words "shall employ their best efforts to" should be replaced by "shall take all possible measures to".

92. Lastly, although in principle he was in favour of draft article 28, he wondered whether such a provision could not be improved by being more detailed.

93. The draft annex proposed by the Special Rapporteur for the implementation of the draft articles raised very many problems. From the standpoint of form, the use of the expression "watercourse State of origin" in article 1 was questionable, while article 2 erred in referring to non-discrimination, since its provisions related, rather, to the principle of reciprocity. In any event, the article gave the impression that the so-called State of origin could unilaterally consider the permissibility of proposed, planned or existing activities. The articles provisionally adopted by the Commission placed obligations on States to act or not act, including with regard to protection and preservation. Accordingly, the provision should in any event oblige States to refrain from undertaking any activities which might cause injurious effects in other watercourse States.

94. As for substance, it was quite inconceivable to make a State seek in the courts of another State reparation and compensation in respect of harm originating in that other State. To so exclude a dispute from the domain of international law and place it under municipal law was tantamount to vitiating the principle of the international legal liability of the State and to contradicting international practice in that field. Such disputes should be settled directly between the States concerned through the peaceful, diplomatic and arbitral means available under international law. That being the case, draft articles 3 to 6 had no raison d'être. Draft article 7, relating to the Conference of the Parties, was irrelevant to a treaty of the form to be taken by the draft articles.

95. With regard to draft articles 22 to 27, provisionally adopted by the Commission at its preceding session, his delegation was still concerned by the fact that the concept of harm continued to be defined by such vague and subjective terms as "appreciable" or "serious".

96. Lastly, he wished to draw attention to what might constitute a serious omission from the draft articles, namely the intensive work done in recent years under the auspices of the World Meteorological Organization and the United Nations Environment Programme on the consequences, including the consequences for water resources, which might stem from a change in the global climate. On the basis of that work consideration should be given to the question whether it would be relevant to include in the draft articles provisions encouraging watercourse States to co-operate with a view to jointly facing the consequences which might arise for the watercourse in question as a result of global warming.

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97. With regard to the jurisdictional immunities of States and their property, he reiterated his concern about the direction given to the work, which, in his view, it was difficult to incorporate in the codification exercise, since the draft articles formulated to date on the matter, such as articles 1 to 11, far from corresponding to the general practice of States, simply reflected the legislative practice of some States. There had been a mistaken attempt to represent the relativity of immunities as an absolute while disregarding the general trend followed by the members of the international community.

98. With regard to immunities in the event of personal injuries and damage to property, referred to in draft article 13, two safeguard clauses should be included providing that immunity would be respected, on the one hand, if the State which was the author of the act or omission had acted in acccordance with an international agreement or treaty in force between itself and the State of the forum, and, on the other hand, if the State which was the author of the act or omission had acted in the discharge of diplomatic or consular functions.

99. Further, the main provision of draft article 14 (Ownership, possession and use of property) must be subordinated to an express reservation respecting the immunity of property protected under diplomatic or consular immunity, in accordance with international law. Moreover, the use or purpose of all property must be established in the same way as was specified in the case of ships, in draft article 18, paragraph 7, by means of a certificate signed by a competent authority of the State concerned.

100. Draft article 15, relating to patents, trademarks and intellectual or industrial property should be deleted, since those topics were regulated by specific conventions, such as those of the World Intellectual Property Organization. In any event the scope of the provision should have been restricted to the commercial domain. Similarly, consideration should be given to the insertion in article 16 (Fiscal matters) of an exception in respect of matters regulated by international law relating to diplomatic and consular privileges and immunities.

101. In conclusion, he trusted that the Commission and Special Rapporteur would take due account of his comments.

102. Mr. RANJEVA (Madagascar), with reference to international liability for injurious consequences arising out of acts not prohibited by international law, said that, with regard to the scope of the draft articles, he fully understood the relevance of enumerating activities involving risk and activities with harmful effects, but feared, on reflection, that the Commission was drowning in sophistry. What should be done with regard to activities not so enumerated? In terms of methodology and the commentary such an approach was acceptable, but it was not to be recommended at the level of international codification. There might be a grave risk of confusion, and the comments contained in paragraphs 474 and 475 of the Commission's report should be endorsed. It seemed that an effort must be made to devise a formula which was sufficiently general and which clearly stated the

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principle of reparation for harm registered, irrespective of its physical or material causes. It was also necessary to believe in the progress of science and accept that at some time in the future mankind would be able to counter the harmful or dangerous effects of a particular activity. It would be desirable for implementation of the régime not to lead to a Byzantine debate on the classification of an activity as dangerous or harmful when the harm had already occurred with sometimes irreparable consequences. However, his delegation had no objection in principle to basing the "quantum" assessment technique on classification studies to apportion the respective degrees of liability in transboundary harm.

103. His delegation welcomed the affirmation and inclusion of the principle of non-discrimination. He wished, however, in view of the practical difficulties encountered, to see reference in the relevant provisions to the means of application of the principle of *cautio judicatum solvi* in order to avoid excessive resistance inspired by juridical and procedural nationalism. Any such reference to the guarantee of *judicatum solvi* must, however, take account of the comments that his delegation would make on chapter V of the draft.

104. With regard to chapter III, relating to prevention, his delegation wished to draw the Commission's attention to a practical point. The desire to establish preventive machinery was commendable, but it should be recalled that the principal purpose of liability was to punish an alteration of the *status quo* or of the law before harm occurred, so that liability was used to establish the *status quo ante*. In those circumstances, the duty of prevention stemmed more from a general obligation of conduct and prudence, principally under the régime of international co-operation, than from the law of liability. Further work must be carried out with the aim of developing the means of such international co-operation in the prevention of harm, but it was questionable whether that should be done at the level of the Commission. His delegation had its doubts, and a systematic review of the machinery actually employed in the practice of technical international organizations and in the international management of certain activities which were liable to cause harm would clarify the fundamental distribution between liability on the one hand and prevention in the strict sense on the other hand. To facilitate understanding of the general arrangement of the text, the final drafting should highlight the distinction between regulatory standards and guidelines for application. In the light of those remarks, his delegation suggested a re-reading by the Commission of chapter III as a whole, to settle any doubts.

105. Turning to chapter IV, he said that the fundamental principles set out in paragraph 508 gave rise to no objection in principle. It was thus of cardinal importance, as some members of the Commission considered, to mention the obligation to pay compensation for the harm caused. That being the case, the object of chapter IV would be to develop an additional reference mechanism in the event of failure to pay compensation to the victims of the harm.

106. With further reference to the general principles, he said that his delegation could not share the idea that the unlawful activity could be the only source of

(Mr. Ranjeva, Madagascar)

international liability. Scientific progress had led to new risks, and new legal machinery implied the primary liability of the State of origin in inter-State relations. It would be conceivable to exonerate a State from liability only if there was an international régime for the substitution of liability which effectively guaranteed protection of the rights of third parties. That was a significant innovation, admittedly, but the progressive development of international law was first of all a wager oriented towards the future; it was the function of law to contemplate and organize that future.

107. In those circumstances, the conclusion of paragraph 510 prompted certain reservations if looked at from the vantage-point of the law of international relations. Under the concept of primary liability, the State of origin should be regarded as providing an international guarantee of liability for the activities of persons under its jurisdiction, rather than as the source of payment. That comment should not be seen as a rejection, but rather as an appeal for re-examination of the theoretical balance between the rules supposed to govern chapter IV.

108. With regard to article 23, his delegation suggested that the expression "in principle" should be deleted, in order not to weaken the scope of the article.

109. With respect to the régime of civil responsibility, the subject of chapter V, his delegation acknowledged that the difficulty lay in the interrelationship between private civil-responsibility law and international responsibility law, and it was apprehensive that the examination of the terms of the problem in an exclusively theoretical framework might lead to paralysis of the Commission's work. It therefore considered that clarification of that interrelationship was urgently needed. For that purpose, it suggested that at the methodological level, a comprehensive, parallel theoretical analysis should be adopted rather than the traditional sequential and linear approach. That would involve an examination of the parallelism between the two juridical concepts concerned, namely, civil responsibility and international responsibility, with one overriding idea: it was not a matter of reasoning in terms of mutually exclusive or alternative concepts, or of envisaging a war of position between the two forms of responsibility. The difficulty lay in the fact that, while there was only one objective, namely, reparation for the damage caused, two unsynchronized concepts had to be managed simultaneously. Only later would it be possible to take an informed decision on incorporating an article on civil responsibility.

110. The question of liability for damage caused to the environment in areas beyond national jurisdiction was extremely difficult, but his delegation would have liked the Commission to examine the merits of extending the Montego Bay Convention régime to matters other than the law of the sea. It reserved its position on that question pending the conclusions of the Special Rapporteur.

111. Turning to paragraphs 396 and 387 of the report, which dealt with the question whether sanctions should be punitive or not, he said that subjective or individual moral considerations should be excluded from the régime of reparation, especially in international relations. He wondered whether to rely on the concept of punitive

(Mr. Ranjeva, Madagascar)

sanctions was not to foreshorten an intellectual operation which involved a process of legal reasoning composed of five phases: (1) the establishment of a legal norm; (2) the advent of an activity having an impact on the environment; (3) examination of the nature of phase 2 in relation to the prescriptions of the phase 1 norm; (4) determination of the consistency or inconsistency of phase 2 in relation to phase 1; and (5) restoration of the authority of phase 1. Sanctions would thus come into play only with the conclusion of the analytical operation, phase 4, while potestative punishment, should it be concluded that there was inconsistency, belonged to phase 5, and there should be no confusion between the notions of sanction and punishment.

112. Mr. AKAY (Turkey), speaking in exercise of the right of reply, said that a certain delegation had alluded at the previous meeting to the crisis in the Persian Gulf and had drawn a false analogy with the situation in Cyprus. In that connection, he recalled the statement in the General Assembly by his delegation in exercise of the right of reply on the last day of the general debate. It took the view that the Greek-Cypriot delegation should not attempt to mislead the Committee and should refrain from raising the issue. The two Cypriot peoples were involved in a political dispute which could only be settled by direct negotiation within the framework of the mission of good offices which the Security Council had entrusted to the Secretary-General under its resolution 649. The basis of a solution to the Cyprus question had been recently set forth in a statement by the President of the Council, which had been issued as a document of the Council (S/21934). The statement appealed to all the parties concerned not to aggravate the situation only to refrain from making the kind of provocative statements the Greek-Cypriot speaker had made at the previous meeting.

113. Mr. JACOVIDES (Cyprus) said that there was nothing in the statement he had made at the previous meeting which was incompatible with resolution 649 or any other resolution of the Security Council. The position of his Government with regard to the procedures for settling the Cyprus question was quite clear. It supported the Secretary-General's mission of good offices, unlike Turkey, which, by failing to apply either resolution 649 or the other Security Council resolutions, was complicating the task of the Secretary-General. At the previous meeting, he had done no more than make references which were pertinent to the agenda item, a procedure which was neither unusual nor inappropriate.

114. Mr. ROUCOUNAS (Greece) reminded members of the Committee of the statement made by the Greek Minister for Foreign Affairs in the General Assembly on the subject of the Cyprus situation on 3 October 1990, and of the statement made by Greece in the Assembly in exercise of the right of reply on 10 October 1990. He also pointed out that the delegation of the Republic of Cyprus was so designated in all international organizations, and that the rules governing participation in international organizations required that delegations should be designated by their official name.

AGENDA ITEM 144: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/45/33; A/C.6/45/L.4)

115. Mr. KUOL (Sudan) said that his delegation had been unable, for reasons beyond its control, to participate in the voting on draft resolution A/C.6/45/L.4, on rationalization of existing United Nations procedures. Had it been present, it would have voted in favour of the draft resolution.

The meeting rose at 6.35 p.m.

UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
38th meeting
held on
Monday, 19 November 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 38th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10 and 469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. SUPHAMONGKHON (Thailand) said that in some situations international law could be enforced only if provision was made for the punishment of individuals who committed crimes against such law. International peace and security might depend on it. The list of crimes set out in chapter II of the draft Code should therefore be regarded as non-exhaustive, and thus subject to future expansion. The Code should cover only the most serious crimes, those upon which there was agreement among the members of the international community, and should give a clear definition of such crimes.

2. On the issue of the establishment of an international criminal court (A/45/10, paras. 93-157), the Commission had rightly noted (para. 117) that international crime had achieved such wide dimensions that it could endanger the very existence of States and seriously disturb international peaceful relations. International terrorism, aggression and illicit traffic in narcotic drugs came readily to mind. However, since the subject-matter was very complicated, it might be premature to establish an international criminal court. At present, effective systems based on the universal jurisdiction of domestic courts did exist for a large number of crimes, and the establishment of an international criminal court must not disrupt the satisfactory functioning of the existing systems. Moreover, account must be taken of the fact that the establishment of an international criminal court would meet with resistance, since it would be seen by many as a serious curtailment of national sovereignty. In any event, it was necessary to set up an effective universal system for the suppression of crimes against the peace and security of mankind. To that end, his delegation encouraged all States to conclude extradition and mutual assistance treaties dealing with various types of proceedings, as Thailand itself had.

3. On the subject of the non-navigational uses of international watercourses (A/45/10, chap. IV), Thailand believed that the purpose of any rules must be to promote co-operation between neighbouring States. The rules in question must therefore not be too precise. Thailand was concerned that the term "international watercourses" should not be defined too broadly, and would therefore prefer the word "system" to be omitted.

4. In view of the principle of the territorial sovereignty of States, the watercourse State of origin must enjoy priority use of the waters in question, provided that it did its best not to injure downstream States. It followed that the obligation to notify other watercourse States of measures with possible adverse effects applied only in cases where human activities were directly responsible for the potential effects. In other cases, notification should take place as soon as

(Mr. Suphamongkhon, Thailand)

practicable. Where draft article 28 was concerned, Thailand endorsed the principle that international watercourses should be inviolable in time of armed conflict. However, such inviolability should not extend to installations, facilities and other works.

5. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. VII), Thailand was of the view that the State of origin was fully liable for transboundary harm, regardless of any preventive measures that it might have taken, and that it must pay full compensation even if the harm was due to an act by a private entity.

6. Mr. PADMANABHAM (India) said that he would begin by commenting on the draft Code of crimes against the peace and security of mankind (chap. II). On the subject of related offences, he wished to propose definitions whose distinctive features he would like to see mentioned in draft articles 15, 16 and 17. A person abetted the commission of a criminal act when he or she instigated any person to commit such an act, or engaged with other persons in any conspiracy and internationally aided the commission of any criminal act. By way of explanation, voluntary concealment of material facts and facilitating commission of any such act should also be added. Conspiracy was an agreement between persons to commit an illegal act, or to cause such an act to be committed, or to commit an act that was not illegal by illegal means, or to cause such act to be committed, irrespective of the legality of the ultimate object of such agreement. Lastly, draft article 17, which specified that attempt to commit a crime against the peace and security of mankind constituted a crime against the peace and security of mankind, should also refer to any act towards the commission of a crime or to cause such a crime to be committed.

7. With regard to the issue of illicit traffic in narcotic drugs (paras. 77-88), India regarded such traffic as a threat both to the health and well-being of people and to the economy. It had adopted comprehensive, rigorous legislation and had become a party to the various international instruments, the most recent of which was the United Nations Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It was therefore in favour of the inclusion of drug trafficking as a crime in the draft Code.

8. In principle, India was in favour of the establishment of an international criminal court (paras. 93-157). It would, however, advocate careful consideration of the complex issues involved, so that the General Assembly could decide on the matter in due course.

9. India believed that breach of a treaty designed to ensure international peace and security (paras. 89-92), particularly breach of arms-limitation and disarmament treaties, should be dealt with in a draft article in the Code.

10. India, which was a party to most of the United Nations conventions relevant to the preparation of the Code and was seriously considering becoming a party to the Protocols Additional to the Geneva Conventions, had adapted its legislation so as

(Mr. Padmanabham, India)

to ensure compliance with the Geneva Conventions and the conventions concerning *apartheid* and international terrorism. It wished the Code to be an effective instrument of international legal significance.

11. On the question of international watercourses, dealt with in chapter IV of the report, draft articles 24 to 28 were unnecessary, since their content was already covered by draft articles 6, 8, 9 and 10. They went beyond the scope of the framework agreement on non-navigational uses of international watercourses and imposed unacceptable international obligations without much basis in international law. They therefore required careful re-examination and reformulation. His delegation reserved its right to comment on the subject at a later stage.

12. With regard to the status, privileges and immunities of international organizations, which formed the second part of the topic of "Relations between States and international organizations", dealt with in chapter VI, his delegation generally supported the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/424 and Corr.1). It also supported the Special Rapporteur's view that it was necessary to be pragmatic and therefore to adopt a simple definition of an international organization, without listing the various types of international organizations. The draft should contain only general provisions, which could be modified according to the characteristics of each individual case so as to meet the functional needs of the organization concerned. Likewise, the basic principles set out by the Special Rapporteur were generally acceptable, particularly in respect of immunity from jurisdiction and the inviolability of premises.

13. Lastly, he made several suggestions concerning the Commission's working methods and procedures: the report, which should concentrate on the substantive topics discussed by the Commission, should be transmitted promptly to the countries concerned, before the annual session of the General Assembly; the Commission should seek co-operation with other bodies, such as the Asian-African Legal Consultative Committee; after the end of the Commission's session, Governments should be sent a summary of developments with regard to each topic and the draft articles; the Commission (in particular the Drafting Committee) should have available a computerized data base enabling it to consult the texts of bilateral and multilateral instruments; a non-doctrinal approach, based on a more rigorous and business-like method, should enable the Commission to advance more rapidly in its work; lastly, events which facilitated the participation of developing countries, such as the International Law Seminar, should be encouraged.

14. Mr. NEDELCHEV (Bulgaria) said that the draft Code of crimes against the peace and security of mankind should become the corner-stone of the United Nations system for the maintenance of international peace and security, and thus of the international legal order.

15. With regard to "related offences", he noted that, according to paragraphs 35 to 39 of the report, three methodological approaches had been suggested, which he briefly summarized. In his view, the Commission should define those three concepts

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and leave it to the competent courts to decide whether they were applicable in specific cases brought before them.

16. Referring to the debate which had taken place in the Commission concerning whether the draft Code should include an article on breach of a treaty designed to ensure international peace and security (paras. 89-92), he favoured a practical approach: if an act constituted a crime against international peace and security, it should be treated as such, whether or not it violated a treaty.

17. It was premature at the current stage to consider the question of establishing an international criminal jurisdiction; priority should be given to a definition of the crimes covered by the draft Code, as stated by the Commission itself (para. 118): "The system of universal jurisdiction exists for a large number of crimes, in some cases with the participation of a large number of States, and prosecution is carried out effectively in national courts. Proposals for a court must therefore take into account the danger of disrupting satisfactory implementation of the existing systems."

18. It was necessary for the Commission to finalize its work on State responsibility - the subject of chapter V - before the end of the United Nations Decade of International Law and to give priority to that topic in its future programme of work. The draft articles under elaboration should contain general rules which might not be directly applied in every possible case, and should be worded in a sufficiently flexible manner to give States the possibility of elaborating, where appropriate, specific rules on responsibility in various fields of international law, of negotiating the concrete terms of responsibility when a wrongful act had been committed, or of using other means of settlement of the issue.

19. He agreed with the Special Rapporteur's general conclusion that damage suffered by a State as a result of an internationally wrongful act could be broadly divided into two categories: material damage and moral damage. That distinction should also be applied to the consequences of an international delict. The general approach taken in draft article 8 (footnote 247), namely, that restitution in kind and pecuniary compensation should ensure complete reparation, and that the latter should be applied where the former remedy had failed to restore the status quo ante, was satisfactory. The payment of interest (draft art. 9, footnote 262) could hardly be separated from pecuniary compensation. In that regard, it was necessary either to delete the provision dealing with interest while taking into account that compensation should ensure full reparation of damage, including both damnum emergens and lucrum cessans, or to include a general obligation to pay interest in draft article 8, probably in paragraph 3.

20. Satisfaction (draft art. 10, footnote 263) should be a remedy applied only to moral injury in its traditional sense, namely to the infringement of the State's dignity, honour and prestige. The reference to legal injury should be deleted. As to the guarantees of non-repetition of the wrongful act, they should not be limited to moral damage. He had noted with satisfaction the Special Rapporteur's readiness

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to devote a separate article to that issue. With regard to the "punitive" nature of satisfaction, he shared the doubts expressed in the Commission and the Sixth Committee concerning its consistency with the nature and consequences of the delict.

21. The future instrument on international liability for injurious consequences arising out of acts not prohibited by international law should be a framework agreement containing a limited set of binding general rules and guidelines, and its main purpose should be to introduce into general international law the principle of international liability for transboundary harm as a result of lawful activities. It could also contain general criteria and rules for the implementation of liability unless otherwise agreed between the States concerned. In accordance with the same logic, draft article 21 (footnote 315) should simply state the obligation to pay compensation, and should be followed by another article indicating the circumstances under which the compensation might be reduced or even excluded. In view of the lawful character of the activities, only significant harm should give rise to liability, and the scope of compensation should be limited to the damnum emergens and to the cost of any reasonable operations to restore the conditions which existed prior to the occurrence of harm.

22. A clear distinction should be made not only between the concept of liability for harm as a result of lawful activity and the concept of responsibility for a wrongful act, but also between the concept of liability and that of risk. The last two concepts should be treated separately because one involved an obligation to compensate and the other an obligation to prevent. The concept of risk went beyond the scope of the draft since the fact of carrying out activities without transboundary harm could not give rise to an obligation to compensate. Nevertheless, there was merit in addressing the issue of risk in order to establish minimum standards for prevention and co-operation or, perhaps, to limit the scope of the draft to compensation for harm arising out of lawful activity involving risk. The operator should be held primarily liable, while the State of origin should bear subsidiary liability limited to that part of the operator's liability in respect of which the operator did not provide compensation. The State could be held primarily responsible when the given activity could be attributed directly to it, or when a treaty provided for liability for the whole activity under national jurisdiction or control.

23. In order to be generally acceptable and effective, the instrument under elaboration on jurisdictional immunities of States and their property should take into account, first, the existence of different national legislative approaches, and second, the fact that some States were in the process of reviewing their laws in that area. In the case of Bulgaria, there was no doubt that the radical changes which would be made to its laws in order to create the conditions for a transition to a market economy would have consequences for its national policy with regard to the topic under consideration.

24. With regard to the concept of State enterprises with segregated State property, he explained that under current Bulgarian legislation, the State bore no

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liability for the obligation of enterprises, whether State or private enterprises, and enterprises, including State enterprises, were not liable for the obligations of the State or other enterprises. Furthermore, the new Bulgarian Law on Maritime Areas extended immunity only to warships and other vessels operated for non-commercial purposes, in accordance with the United Nations Convention on the Law of the Sea. From the point of view of Bulgarian law, the question of the immunity of State enterprises engaged in commercial activity did not arise. The problem lay in the concept of liability. That was why his delegation saw merit in the Australian proposal to add a safeguard clause in the draft articles to make it clear that they were without prejudice to the attribution of any liability to a given legal entity under the law governing the status and transactions of that entity.

25. With regard to the law of the non-navigational uses of international watercourses, his delegation reiterated its preference for a framework instrument providing States with guidelines for the conclusion of specific agreements on specific watercourses. The instrument should not go into detail, particularly with regard to procedure, nor should it establish general binding obligations which might affect existing agreements or unduly restrict the discretion of riparian States to conclude agreements. Despite the Commission's stated intentions, the draft articles did not always reflect that approach, and they should be amended on second reading with a view to devoting a large number of articles to general principles and basic rules. His delegation shared the doubts expressed in the Commission regarding article 26, on joint institutional management (footnote 123): the draft should not provide for the establishment of a permanent organization, and it should be left to the parties to future watercourse agreements to define the functions of any bodies set up under those agreements. Annex I, on implementation of the draft articles (footnote 126), in particular, article 3, paragraph 2, and articles 6 to 8, seemed to go far beyond the scope of a framework agreement.

26. Mr. DASTIS (Spain) said that it would not make sense to elaborate a code of crimes against the peace and security of mankind without also establishing a mechanism to ensure its implementation, and he welcomed the detailed study of the question of the establishment of an international criminal jurisdiction contained in paragraphs 93 to 156 of the report of the International Law Commission (A/45/10). His delegation agreed with the Commission that recent developments in international relations, which had strengthened the confidence of States in the possibility of basing international order on the rule of law, made the establishment of such a jurisdiction more feasible than when the matter had been studied earlier. Moreover, the international community gradually had grown increasingly aware that certain international crimes had achieved such wide dimensions that they could endanger the very existence of States and seriously compromise international peaceful relations. That was what had prompted the General Assembly, in its resolution 44/39, to request the Commission to address the question of establishing an international criminal court, a request which had been reiterated by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. His delegation had also noted with interest the views on the subject recently advanced in the General Assembly by the foreign minister of a State which was a permanent member of the Security Council.

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27. As to the models suggested by the Commission in paragraph 155 of its report, the Commission should continue to explore the option of an international criminal court having only a review competence, since the other options (exclusive jurisdiction and concurrent jurisdiction) had many drawbacks which had been highlighted in the Commission's commentaries. His delegation favoured endowing the court with competence to issue advisory legal opinions on criminal matters at the request of competent United Nations organs. It reserved its position for the time being on the possibility of also allowing national courts to request such opinions (para. 134). With regard to penalties, the Code should, in accordance with the rule nulla poena sine lege, provide that penalties should be proportionate to the gravity of the crime committed and that the death penalty, which ran counter to his country's Constitution, should be excluded. It was still too soon to determine whether the court should be a permanent organ. The answer to that question would depend on the degree to which the idea was accepted by States and on the financial implications of a permanent court. The Commission had not yet addressed the question of the cost and method of financing, and it should do so in the future. His delegation agreed with the conclusion of the Commission (para. 157) to the effect that establishing an international criminal court would be a step in developing international law and strengthening the rule of law, but that it would be successful only if widely supported by the international community.

28. With regard to article 16, on international terrorism (p. 60), his delegation would wait to express its opinion until the Commission had reviewed paragraph 2 of the article, on participation by individuals, in the light of the future provisions on complicity and crimes against humanity. With regard to article X (p. 62), his delegation was prepared to give favourable consideration to appropriate penal machinery to combat drug trafficking. It urged the Commission to review the issue more thoroughly, bearing in mind its relationship with terrorism and mercenarism. The article should characterize as a crime only illicit traffic on a large scale and should take into account not only transboundary traffic, but also, traffic within the confines of a State.

29. Generally speaking, his delegation continued to believe that the main objective of the Code should be to elaborate an exhaustive list of carefully defined international crimes based as far as possible on the offences envisaged in existing international instruments, as that would facilitate general acceptance by States. The list should include only serious crimes which threatened the fundamental interests of the international community, and should observe the distinction between international crimes and offences established in the draft articles on State responsibility.

30. Turning to the jurisdictional immunities of States and their property, the condition imposed in article 12, paragraph 1 (footnote 79), to the effect that the employee must be covered by the social security provisions of the State of residence in order for immunity not to be invokable, should be deleted. However, the reference in subparagraph 2 (a) of the article to the effect that the employee had been recruited to perform services associated with the exercise of governmental authority should be retained. That formula was preferable to the text proposed in

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paragraph 177 of the report referring to the administrative or technical staff of a diplomatic or consular mission, which was too restrictive. As presently drafted, subparagraph 2 (b) could leave the employee totally without recourse. Accordingly, in the cases envisaged, instead of disallowing immunity, the subparagraph should replace the obligation to recruit or reinstate an individual with the obligation to pay compensation.

31. Article 13 (footnote 85) should be retained and its scope should not be restricted to damage resulting from the use of means of transport. It should also be borne in mind that the acts or omissions to which the article referred could constitute internationally wrongful acts and that the settlement of the resulting disputes might already be governed by international treaties or agreements. A safeguard clause therefore should be included in a new paragraph recognizing the applicability of the provisions of such treaties or agreements. The same observation applied to article 16 (footnote 88), for it was not unusual for the fiscal obligations of a State or of its bodies in another State to be governed by bilateral agreements. In article 18 (footnote 90), the clause "used or intended for use in government non-commercial service" in paragraph 2 should be replaced by the expression used in article 96 of the United Nations Convention on the Law of the Sea, "used only on government non-commercial service". The question of harmonization aside, that solution would have the advantage of limiting immunity to cases in which the ship was in fact used for such purposes.

32. In article 19 (footnote 94), the exception should not be limited to arbitration agreements in civil or commercial matters, but should apply to all types of disputes with private individuals which the State had agreed to submit to arbitration. His delegation agreed to the deletion of article 20, which dealt with a matter that was too complex to be covered in a single article. It also agreed to the merger of articles 21 and 22 in the second alternative proposed by the Special Rapporteur (footnote 99). However, the new article 23 appeared superfluous in view of the provisions of article 11 bis (A/CN.4/431, p. 21), which accorded the same treatment to State enterprises engaging in commercial transactions with foreign natural or juridical persons as that applicable to natural or juridical persons. Lastly, in article 27 (footnote 103), the phrase "fallo en ausencia" in the Spanish text should be replaced by "fallo en rebeldía".

33. With regard to the law of the non-navigational uses of international watercourses (chap. IV), his delegation considered that the framework agreement formula was justified as a starting-point; it was, however, premature to take a final decision on the nature of the legal instrument which would incorporate the rules that were being drafted. His delegation hoped that the best solution would turn out to be that of an international convention.

34. It wished to reiterate its preference for an approach based on the concept of "watercourse" rather than that of "watercourse system", which was too vague and which, since it emcompassed various hydrographic components (rivers, lakes, canals, glaciers and ground water), had territorial connotations. His delegation also found the concept of "ecosystems" ambiguous, even though it did not dispute that it

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could have a quite specific scientific meaning. It was too broad, and encompassed spatial units which went considerably beyond the concept of "watercourse". Also, despite the commentary on article 22 (p. 147), it could not always see the precise difference between the concept of "environment" and that of "ecosystem", all the more so in that reference was made in the definitions given in footnote 144 to the "non-living environment" and to the "environment". Finally, it continued to regard as unduly ambiguous the term "appreciable harm", which it would like to see replaced by "considerable harm" or "substantial harm".

35. The obligation of co-operation provided in article 25 (footnote 122) should be considerably qualified. The notion of equity mentioned in paragraph 2, while unassailable from a theoretical point of view, was generally reflected in practice by a political compromise between the interests of the States concerned which was the outcome of diplomatic negotiations. Furthermore, States would have difficulty in accepting the obligation of co-operation in paragraph 1 without making it subject to the prior conclusion of an agreement on financing the regulation works referred to in paragraph 2. Since in general international law there was no obligation to establish joint management bodies, and since the stipulation of such an obligation would probably go beyond the limits of a "framework agreement", paragraph 1 of article 26 (footnote 123) would have to be restricted to making a recommendation to that effect which States would take into account according to the specific features of each watercourse.

36. Article 28 (footnote 124) went beyond the scope of the draft, which should not deal with questions related to armed conflicts. The articles in annex I, on implementation (footnote 126), should be included in an optional protocol, so that States which decided to become parties to the framework agreement would not be obliged to accept the obligations provided under them at the same time. His delegation also had serious doubts as to the timeliness of convening the Conference of the Parties referred to in article 7, particularly if the Conference was supposed to take place "not later than two years after the entry into force of the ... draft articles". It would be better to include the provisions of articles 7 and 8, if they were retained, in the final provisions.

37. Turning to the topic of State responsibility (chap. V), his delegation said that it preferred alternative (b) of paragraph 1 of article 8 (footnote 247), since alternative (a) gave the impression that the purpose of compensation was to restore the situation that would have existed if the wrongful act had not been committed, whereas in fact it was necessary precisely when the re-establishment of that situation was impossible. The two alternatives seemed to be based on a notion of partial restitution in kind which was to be supplemented by compensation. It might be asked whether that was compatible with the very nature of restitution. It would perhaps be preferable to reserve the term "restitution in kind" for the case in which such restitution fully re-established the situation that would have existed if the wrongful act had not been committed.

38. His delegation approved of the reference to "any economically assessable damage" in paragraph 2 of article 8, and agreed that it should include any moral

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damage sustained by the injured State's nationals. In his delegation's view, non-material damage sustained by the State itself should aslo be included. It also approved of paragraph 3, which stated that compensation included any profits the loss of which derived from the internationally wrongful act. The provision should also mention interest, a question currently dealt with in article 9, which should be deleted. The term "uninterrupted causal link" in paragraph 4 might have too much ambiguity. It would be preferable to specify that the damage deriving from an internationally wrongful act was to be taken as referring solely to the loss of which it was the immediate and foreseeable cause.

39. The reference in paragraph 1 of article 10 (footnote 263) to "punitive damages" should be deleted because of its penal connotations, and particularly because the consequences of the offences would be dealt with separately. While agreeing that the guarantee of non-repetition of the wrongful act should be included as one of the modes of satisfaction, his delegation did not see why it should be confined to moral or non-material damage. A separate article, which would also provide guarantees of non-repetition in the case of material damage, should therefore be devoted to that issue.

40. Referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law (chap. VII), he welcomed, first of all, the introduction of the term "significant risk", which was undoubtedly preferable to the expression "appreciable risk", since the latter did not imply the degree of gravity necessary for an activity to fall within the scope of the draft articles. Certain ambiguities would have to be eliminated, in particular in draft article 2 (e), where there could be no question of referring to "minor, though significant, transboundary harm".

41. He wondered whether it was in fact desirable to deal jointly with activities involving risk and activities with harmful effects. In the case of the former, it was the element of prevention which took precedence, while in the case of the latter liability was the issue. That being so, it was hard to see how a single régime could be established for both categories of activities. In that connection, it should be recalled that the main aim of the draft was to be liability for damage caused, and a clear distinction should be drawn between the two parts. In particular, the exhaustive treatment of the obligations of prevention would only be justified if it were determined that non-compliance with those obligations would entail the international liability of the State. For the time being, the issue was not clearly addressed in the draft articles and should be examined in greater depth.

42. His delegation considered it neither useful nor desirable to draw up a list of dangerous substances, which, while out of place in an agreement of general scope, would be still less appropriate in a framework agreement. Furthermore, a non-exhaustive list would be insufficiently precise, while an exhaustive list was liable to become rapidly obsolete and to lead to difficulties if other substances had to be added. Finally, substances which were not dangerous could cause transboundary harm, whereas the use of substances which were theoretically dangerous might not entail any risk of that nature.

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43. His delegation could not acknowledge the primary liability of the State in cases in which the harm had been caused by private operators. The State must certainly regulate dangerous activities and ensure compliance with the obligations of prevention, but the activities of private operators were entirely at their own liability, since the liability of the State was merely subsidiary and could not be invoked except in a case of non-compliance with its international obligations and on the basis of its liability for wrongful acts.

44. In conclusion, he said that his delegation could not accept the assertion in article 28 that it was not necessary for all local legal remedies available to the affected State to be exhausted prior to submitting a claim to the State of origin for liability in the event of transboundary harm. It was essential that such remedies could be exercised effectively, just as it was essential to regulate dangerous activities and to guarantee liability for harm, if necessary by establishing a system of compulsory insurance or compensation funds. In principle, however, claims for compensation should remain at the domestic level, and should be addressed to private operators.

45. Mr. AL-BAHARNA (Bahrain) said that he was gratified to learn that the entire set of draft articles on the jurisdictional immunities of States and their property, as formally adopted by the Commission, was expected to be submitted to the General Assembly at its forty-sixth session. The problem of the jurisdictional immunities of States no longer stemmed from the opposition between the theory of limited immunity and that of absolute immunity, and from now on the Commission should base itself on considerations of reciprocity in order to finalize the rules and principles governing jurisdictional immunities. It should also resist the temptation to make any kind of radical changes in the draft articles, since such changes might upset the structure approved on first reading.

46. With regard to the title of Part III ("Limitations on" or "Exceptions to" State immunity), his delegation was prepared to support a neutral formulation such as "Activities of States in respect of which States agree not to invoke immunity" (A/45/10, para. 173).

47. In paragraph 184 of the report (A/45/10), the Special Rapporteur had proposed that the reference to the social security requirement in article 12, paragraph 1, be deleted and that subparagraphs (a) and (b) be reconsidered by the Drafting Committee. While supporting those proposals, his delegation would like the Drafting Committee to streamline the text, if possible by combining paragraphs 1 and 2, in order to convey beyond doubt the scope of the non-immunity principle with respect to contracts of employment.

48. His delegation in principle endorsed article 13 but would like its meaning and scope to be made clearer. As for article 14, which it considered to be too detailed, it supported the Special Rapporteur's recommendation to delete paragraph 1, subparagraphs (c), (d) and (e), which did not reflect the universal practice of States. With respect to article 15, his delegation was sceptical, at the current stage of codification, about the introduction of references to "a plant

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breeder's right" and "a right in computer-generated works", which would tend further to restrict the scope of the immunity principle. It considered those "rights" to be innovations which could not be equated with well-recognized rights in regard to patents, trade marks, etc.

49. His delegation supported the Special Rapporteur's recommendation to delete the word "non-governmental" from article 18, with the proviso that the words "for commercial purposes", in paragraphs 1 and 4 of that article, were explained in the commentary as indicating that a ship engaged in a governmental mission would enjoy immunity. Such an explanation would facilitate acceptance of the deletion suggested by the Special Rapporteur.

50. With respect to article 19, his delegation preferred the term "commercial contract" to "civil or commercial matter". It did not favour the addition of the proposed subparagraph (d), which was not justifiable in law, and supported the retention of the last part of the chapeau ("a court of another State which is otherwise competent"), because its meaning was clear and its content less complex than the alternative formulation suggested by the Special Rapporteur. It also wished to reiterate that it was too late to make substantive changes to the text.

51. Article 20, concerning cases of nationalization, was too complex a subject to be dealt with in such a cursory manner, and his delegation shared the views of those members of the Commission who had suggested its deletion. The question of nationalization should be decided by the courts of the forum State in accordance with appropriate rules of public or private international law.

52. In part IV (draft arts. 21 to 23), which dealt with the well-founded principle of international law whereby consent to the exercise of jurisdiction by the forum State was not equivalent to consent to execution, the question facing the Commission was how best to give effect to that principle. His delegation did not agree with the Special Rapporteur (para. 218) that "limited execution ... would have a better chance of obtaining general approval" and shared the concern expressed in paragraph 221, namely, that the recent tendency to restrict State immunity from execution was a dangerous departure from the rules of sovereign immunity of States and should be curbed by the Commission.

53. The changes proposed by the Special Rapporteur in paragraph 220 of the report would tilt the balance in favour of the "limited" immunity principle, thereby upsetting the compromise achieved by the Commission when it adopted articles 21 to 23 on first reading. His delegation did not therefore support the proposed changes, which would amount to a radical departure from the text approved on first reading.

54. His delegation was not fully satisfied with the new text of article 24, which was, however, far less ambitious than the one proposed by the Special Rapporteur and adopted on first reading. Each State had its own rules as to the service of process, to which the courts attached the greatest importance. On the other hand, it could not be assumed that States would be willing to modify their domestic rules

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of civil procedure in order to make them conform with the future instrument. It would therefore be advisable to add a new subparagraph (a) to paragraph 1, reading "in accordance with the rules of civil procedure of the State of forum", and to renumber former subparagraphs (a) and (b) as (b) and (c). The incorporation of that clause would facilitate acceptance of paragraph 4.

55. In paragraph 3 of article 24, it was necessary to delete the words "if necessary" and to add, as suggested by the Special Rapporteur, the phrase "or at least by a translation into one of the official languages of the United Nations".

56. His delegation endorsed article 25, on the understanding that article 24, paragraph 1, would include the new subparagraph (a) as suggested, in order to give States additional protection against default judgements. It had no objection to the inclusion, at the end of article 25, paragraph 1, of the words "and if the court had jurisdiction in accordance with the present articles" (para. 233). Finally, the words "if necessary" should also be deleted, as in the case of article 24, paragraph 3.

57. His delegation suggested that draft article 26 be replaced by the following text: "Where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or refrain from performing a specific act".

58. It did not seem necessary to include draft article 28, which was modelled on article 47 of the Vienna Convention on Diplomatic Relations of 1961 and on article 72 of the Vienna Convention on Consular Relations of 1963. The rule of non-discrimination, although logical in the case of diplomatic or consular agents, made little sense in the case of States. His delegation therefore believed that the draft article should simply be deleted.

59. Turning to the question of the law of the non-navigational uses of international watercourses (chap. IV), he said that the Commission should not abandon the framework agreement approach, which was the only way for watercourse States to conclude agreements which were compatible with their particular needs and circumstances. He noted with satisfaction the assurance given in that respect by the Special Rapporteur in paragraph 258 of the report.

60. In the opinion of his delegation, draft article 24 dealt with two different subjects, since paragraph 1 addressed the relationship between navigational and non-navigational uses, while paragraph 2 addressed the absence of priority among uses. It suggested that those paragraphs be converted into two separate articles. In paragraph 1, it would like the words "other use" to be replaced by "other use or category of uses", which would better convey the sense of the principle. Paragraph 2 was by far the most important provision of the article, and the problem of conflicts between uses of a watercourse called for more comprehensive and detailed treatment. Articles VII and VIII of the Helsinki Rules of 1966 offered a useful model in that connection.

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61. With respect to article 25, the term "regulation" should be defined either in the body of the article itself or in the article on general definitions. In paragraph 1, his delegation shared the view of some members of the Commission that the obligation to co-operate should be expressed more flexibly in order that co-operation might be effected either directly or through regional or international organizations as well (para. 270). It hoped that the Commission would elaborate paragraph 2 by including some of the provisions governing the regulation of international watercourses adopted by the International Law Association at Belgrade in 1980. Provisions of that nature should help to facilitate the solution of conflicts.

62. Article 26, concerning joint institutional management, was definitely an important component of the draft articles. Recent treaties had seen an extension of the role of joint commissions in the management of international watercourses. There was, however, no legal obligation to consult with a view to establishing a joint body or organization (para. 277), and his delegation therefore recommended that the Commission should proceed cautiously in formulating an article on institutional management. Moreover, with reference to the proposal that the obligation to consult should be made subject to certain conditions, it could not agree with the reasoning of the Special Rapporteur (para. 288) and thought that a statement of conditions might make the text more realistic and acceptable to a large number of States. It also felt that paragraphs 2 and 3 should be merged, as they dealt with the functions of the management organization referred to in paragraph 1. It supported the inclusion of the definition of "management" in the text of the article rather than in an annex and would prefer to see the term "joint organization" replaced by "joint commission", which seemed to it to be more appropriate.

63. His delegation agreed with the general thrust of draft articles 27 and 28, concerning the protection of water resources and installations. However, the importance of dams and other hydraulic installations in modern-day life made their protection imperative both in time of peace and in armed conflicts. It therefore supported draft articles 27 and 28 and would not object if the Commission co-ordinated them with other articles, provided that their scope and effect were not reduced. It agreed with the suggestion made in paragraph 303 of the report that the word "inviolable" should be replaced by a more felicitous term.

64. The draft articles presented in annex I stated principles which his delegation found contentious and unorthodox in both nature and content. Draft articles 2 and 3 might require changes in national laws. For example, article 2 would mean that a nuisance in a downstream State would be equated with a nuisance in an upstream State. As long as the rules of liability for tortious acts were not internationally uniform and as long as the rules of procedure and evidence differed from country to country, it was not possible to establish a rule such as the one contained in draft article 2. The same criticism applied mutatis mutandis to draft article 3, which would require changes in national laws and procedures as regards the cause of action and forum of suit. Moreover, the two articles went beyond the scope of a framework agreement, as did articles 6 to 8, as some members of the

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Commission had remarked. His delegation therefore noted with satisfaction from paragraph 311 that the Special Rapporteur had concluded that the annex was not yet ripe for referral to the Drafting Committee and had reserved the possibility of submitting new proposals regarding the annex at the next session. Finally, it once again urged the Commission to take care not to alter the character of the draft articles as a framework agreement.

65. Mr. TUERK (Austria) said that he would first make some general comments on the Commission's work and its future agenda in connection with chapter VIII of the report, entitled "Other decisions and conclusions of the Commission". To begin with, it appeared that the Commission planned to complete at its next session the second reading of the topic of jurisdictional immunities of States and their property and intended to give priority to the draft Code and to the law of the non-navigational uses of international watercourses. His delegation supported that decision but noted that it opened up the big issue of what new topics the Commission might take up. The Working Group which had considered the Commission's long-term programme of work had provided welcome analyses and suggestions, but ones which called for comment.

66. The first comment was that the interaction between the Commission and the General Assembly must be intensified in order to provide a better response to the challenge of making international law. The second was that to speak of progress in international law was to assume from the very outset that the international community, in all its diversity, would accept the product of the Commission's endeavours and be ready to convert it into a binding international instrument or a set of non-binding guidelines for the conduct of States. It was therefore the Committee's task to give the Commission sufficiently clear indications about the legal and political viability of certain topics.

67. The third comment was that the progressive development of international law presupposed political decisions. The contacts between the Commission and the Sixth Committee of the General Assembly must be made even closer. Otherwise the Commission might run the risk of being bypassed by developments and overtaken by other forums established by States in order to make international law in particular areas. Such a tendency had already manifested itself among States and it must be counteracted. The Commission awaited clearer indications from the Committee as to the needs of States, but the Commission must in turn present its draft articles for consideration and adoption by the members of the international community within the shortest possible time-frame.

68. In that context the question of the Commission's working methods was extremely important. They were susceptible of further improvement: for example, the Drafting Committee should meet between the regular sessions of the Commission; or the annual session might be split into two parts, although that would have financial implications; or the traditional system of having special rapporteurs present reports might be reviewed in the light of the needs; special rapporteurs should be assisted by two or three of their colleagues in the preparation of their draft documents, for they would thus already reflect a wider range of opinions and be more likely to obtain acceptance by Member States.

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69. There was an even more substantive issue - the use of State practice as the basis for draft articles. State practice was no doubt of the greatest importance but, as some members of the Commission had already pointed out, more weight must be given to its contemporary or more recent manifestations. For example, little inspiration could now be drawn from the Boxer Rebellion.

70. The Commission must choose its new topics with the utmost care and in constant consultation with the Committee. Topics designed to provide practical answers to current issues of legal policy in various areas of international life should have precedence over topics in which doctrinal and theoretical interests prevailed. As the Commission's Working Group had said, a topic relating to the legal aspects of the protection of the environment would certainly have to be included in the Commission's agenda, for otherwise, as already pointed out, it might be bypassed by other forums. But each item must be allocated the time necessary for its consideration and the results must be presented to the General Assembly as quickly as possible. Lastly, the Commission should have the courage to defer, or even to adjourn sine die the consideration of certain topics. The Committee should not allow years of hard work to be wasted because Governments were not ready to accept the draft articles on a given topic.

71. As a conclusion to the methodological part of his statement, he endorsed the request by other delegations that the Commission's report should be reduced to more manageable proportions. Some parts had already been considerably shortened but further efforts still seemed necessary, no matter how hard a task that meant for the drafters. A report which for lack of time could not be studied thoroughly by the people to whom it was primarily addressed, i.e. the representatives of States, lost much of its practical value, no matter how high its academic standard.

72. Turning to chapter IV of the report, concerning the law of the non-navigational uses of international watercourses, he recalled that Austria was situated on one of the great rivers of Europe and was an upstream State as well as a downstream State. The Special Rapporteur on the topic had now covered most of the ground, so that the Commission was now in a position to grasp the range and scope of the draft articles. His delegation had consistently supported the idea of a framework agreement containing the fundamental legal principles accepted by the entire international community and providing a basis for the conclusion of bilateral, regional or subregional watercourse agreements. But the Commission had perhaps aimed too high and had devoted too much time to the drafting of very detailed regulations, thereby compromising the original concept of a framework agreement. Of course the examination of specific details would be useful inasmuch as it would remind States of the points to be taken into consideration in the conclusion of specific agreements, but the Commission should not go too far beyond the existing State practice. The new political situation in Europe, and in the Danube basin in particular, would undoubtedly have significant effects on the transnational management of a river which was one of Europe's main watercourses. If the Commission completed its work on the topic speedily, its conclusions would be of the greatest relevance for all the States of the Danube.

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(Mr. Tuerk, Austria)

73. With regard to draft articles 22 to 27, adopted provisionally by the Commission at its forty-second session, his delegation welcomed the approach taken in article 22 (protection and preservation of ecosystems); Austria had just enacted new legislation using the concept of "ecosystem". But environmental protection must not be regarded as a goal in itself which prevented all human activity. With respect to draft article 23, concerning prevention, reduction and control of pollution, it must be pointed out that pollution could also take the form of long-range air pollution, which should of course be prevented at source, and that the problem was not covered by the draft article as worded at present. The solution of drawing up a list of substances, as envisaged in article 23, paragraph 3, would prompt scepticism in anyone familiar with the experience of States which had tried to establish such lists. A better approach might be to identify harmful substances by defining their main characteristics.

74. Article 24, concerning the introduction of alien or new species, was welcome but it must be remembered that benefits as well as harm could result from the introduction of alien species. The advantages and disadvantages should therefore be weighed against each other for each situation and for each watercourse. That could be achieved if the riparian States concerned held consultations before an alien species was introduced. Article 26, concerning prevention and mitigation of harmful conditions, could be interpreted as entailing a general and unlimited obligation of States to prevent natural disasters, an obligation which would go beyond the international duties of States. The draft article should therefore be reworked. Lastly, draft article 27, concerning emergency situations, contained very detailed rules which seemed to be more concerned with creating equal economic conditions among States than with protecting the environment.

75. In chapter V of its report, "State responsibility", the International Law Commission presented three new draft articles. In the case of the first, article 8 (footnote 247), two alternatives were proposed, of which his delegation preferred alternative (a). It would also like to see a specific reference to the generally recognized principle that pecuniary compensation must be effective. That would involve the question of the currency of the compensation. In paragraph 2, the words "shall cover" raised the question, which would also have to be clarified, of the right of the injured State to choose the form of compensation. His delegation shared the view expressed by a number of others that "moral damage" could not be economically assessed. He also wondered whether paragraph 5, relating to the reduction of compensation in certain cases, was really required.

76. Article 9, "Interest" (footnote 262), should be deleted, and the matter dealt with in a very general manner in the context of paragraph 3 of draft article 8. Any reference to compound interest, which had no basis in State practice, should be dropped.

77. Draft article 10, "Satisfaction and guarantees of non-repetition",posed many questions. The first might be whether monetary compensation was in fact a form of satisfaction. That assumption was not supported by State practice, pecuniary compensation and punitive damages having been denied in many instances, of which he

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(Mr. Tuerk, Austria)

gave some examples. Further, "punishment of the responsible individuals" had no precise meaning as a form of satisfaction in so far as punishment, in countries governed by the rule of law, was a matter of due legal process. It was also questionable, in the case of paragraph 4, whether it was wise to exclude measures falling within domestic jurisdiction. There were cases of human rights violations, for example, where assurances against repetition could be given only if the country's legislation was changed. Lastly, and in general, article 10 was to a large extent based on the assumption that a judicial award would be rendered. However, as long as mandatory jurisdiction was the exception rather than the rule, it might be asked whether the inclusion of the concept of satisfaction was needed at all. The draft article on that question should proceed from the assumption that a negotiated settlement would, in most cases, be the objective of the parties.

78. The question of the impact of fault on the forms and degrees of reparation was dealt with in paragraphs 408 to 412 of the report. His delegation had difficulty in understanding why, if fault was a necessary element for measuring State responsibility, as argued in that passage, the concept had been eliminated from part one of the draft.

79. Chapter VII, "International liability for injurious consequences arising out of acts not prohibited by international law", proposed a complete set of draft articles, thus bringing out the extreme complexity of the subject. The aim of elaborating a uniform régime of liability for the purpose of protecting the environment was perhaps too ambitious. States might be reluctant to accept that type of régime, especially one concerning strict liability which might apply to as yet unknown circumstances and which would in reality amount to an open-ended obligation by States. It would be better, therefore, to adopt a functional sector-by-sector approach leading to separate legal instruments for different situations. There would thus be a different approach concerning hazardous activities on the one hand, and harmful activities on the other: in the first case, damage would entail State responsibility if a primary rule of international law - for example, agreed standards - had been violated, or, if such primary rules did not exist, would be governed by a régime of strict international liability; harmful activity, however, should be tackled within the framework of State responsibility, which would presuppose the determination of primary rules as to levels of permissible emissions. That general rule would be supplemented by the civil liability of the operator in cases where the source of damage could be identified.

80. He referred, in that connection, to the approach of the Standing Committee of the International Atomic Energy Agency, which was working on the question of liability for nuclear damage. If the system it proposed - which he outlined - came into operation, it would constitute a major step forward in respect of State liability.

81. Reviewing briefly the proposed draft articles, he said that draft article 2 (footnote 305) included in its paragraph (b) a list of "dangerous substances" which did not seem very useful: moreover, though a hydroelectric dam

(Mr. Tuerk, Austria)

could not be considered a "dangerous substance", it could nevertheless present a "significant risk". Paragraph (g), concerning "preventive measures", should specify somewhere that the "cost" of such measures must be reasonable. As to paragraph (h), he wondered who was to define what was "normally tolerated". Draft articles 7 and 8 (footnote 307) would profit from revision. Article 10 (footnote 308) could pose a problem if the country of origin had adopted lower standards with respect to a particular substance than the other country concerned.

82. Article 11 (footnote 309) should establish the clear obligation of States to require the collection of information if certain dangerous substances were to be used. Otherwise, the State might not even be in a position to have "reason to believe" that activities falling within the scope of the draft articles were being carried out in its territory. In article 17 (footnote 312), the concept of "an equitable balance of interests" could usefully be replaced by "good faith", which was a well-established concept in international law. As it stood, article 21 (footnote 315) posed problems, in so far as there were situations, of which he gave an example, in which the obligation of the State of origin should go beyond a mere duty to negotiate.

83. Chapter V of the draft articles, on civil responsibility (footnote 321), required in-depth study, in particular with a view to bringing its provisions into line with the provisions of the other chapters. Article 31, "Immunity from jurisdiction", should be adjusted to reflect the stipulations of the draft articles on jurisdictional immunities of States and their property.

84. In conclusion, he referred briefly to chapter VI of the report, on relations between States and international organizations. In his view, the International Law Commission had been right to defer consideration of that topic. Austria, which was host to several United Nations bodies, saw no urgent need for the elaboration of general rules governing relations between States and international organizations, on the one hand, because the treaties establishing those institutions contained general provisions on their legal status, and on the other, because there were specific multilateral treaties governing privileges and immunities. In addition, host countries concluded specific headquarters agreements which covered practically all the questions dealt with in the draft articles in question. When considering with the subject in future, the Commission should bear in mind that there were many other more urgent questions of international law.

AGENDA ITEM 119: PROGRAMME PLANNING

85. The CHAIRMAN recalled that under agenda item 119, the Chairman of the Fifth Committee of the General Assembly had asked the Sixth Committee for its comments on the proposed medium-term plan for the period 1992-1997 (A/45/6). He read out the letter he had prepared in reply, suggesting that programme 9 of the proposed plan should be completed by a more detailed incorporation of the objectives of the

(*The Chairman*)

United Nations Decade of International Law. To that end, the annex to the letter contained the text of two footnotes for insertion at the end of paragraphs 9.8 and 9.38 of the document in question. If he heard no objection, he would take it that the Sixth Committee wished to transmit that letter to the Chairman of the Fifth Committee.

86. *It was so decided*.

The meeting rose at 6.25 p.m.

UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
39th meeting
held on
Tuesday, 13 November 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 39th MEETING

Chairman:	Mr. MIKULKA	(Czechoslovakia)
later:	Mr. LUKABU KHABOUJI N'ZAJI (Vice-Chairman)	(Zaire)

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AGENDA ITEM 138: UNITED NATIONS DECADE OF INTERNATIONAL LAW

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The meeting was called to order at 10.20 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (*continued*) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (*continued*) (A/45/437)

1. Mr. DJIENA WEMBOU (Cameroon) welcomed the substantial progress made by the International Law Commission at its forty-second session on the draft Code on Crimes against the Peace and Security of Mankind. His delegation agreed with the Special Rapporteur that complicity, conspiracy and attempt should be treated as separate offences.

2. The original version of draft article 15, on complicity, was reproduced in footnote 26 of the Commission's report (A/45/100). While his delegation had no problem with the inclusion in the draft article of accessory acts committed prior to the principal offence and subsequent accessory acts, it agreed that distinctions should be drawn. When acts subsequent to the crime were committed on the basis of an agreement or understanding reached before or during its commission, they undoubtedly constituted acts of complicity. However, acts committed after the crime without any prior agreement could, strictly speaking, constitute separate criminal offences. Accordingly, the Commission should provide guidelines, but it should be for the judge, in each specific case, to determine the responsibility of each of the accused.

3. Contrary to those members of the Commission who felt that draft article 16, on conspiracy, was unnecessary, his delegation believed that the provision should be maintained and strengthened. Only the notion of conspiracy would make it possible to put forward such elements as criminal intent, agreement with another person and the attempt to execute the crime. He drew attention, in that connection, to the first sentence of paragraph 66 of the report, which summarized the Special Rapporteur's response to certain questions raised.

4. Preparatory acts, such as participation in a plan to incite or carry out a war of aggression, were punishable and called for an appropriate penalty. Moreover, certain acts, such as genocide and *apartheid*, were precisely the kind of crimes which could be perpetrated only where there was a conspiracy between one group and the State against other ethnic, religious, racial, tribal or cultural groups.

5. His delegation could accept the definition of attempt contained in draft article 17. States should be able to appeal to an international criminal jurisdiction if a State in which a criminal act was being prepared refused to try the conspirators in its own courts or even to take prompt and urgent enforcement measures.

6. With respect to illicit traffic in narcotic drugs, his delegation believed that the two draft articles proposed by the Special Rapporteur should be combined, and that the crime should be identified both as a crime against peace and as a crime against humanity.

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(Mr. Djiena Wembou, Cameroon)

7. Turning to the topic "Jurisdictional immunities of States and their property", he said that State immunity was a fundamental principle of international law which did have certain limits. Accordingly, the title of part III of the draft should read along the following lines: "Limits on the application of State immunity". Moreover, the existing version of draft article 19, on the effects of an arbitration agreement, was too vague regarding the court before which a State party to an arbitration agreement lost its right to invoke immunity. In practice, arbitration agreements determined the competent court or were sufficiently clear to avoid any uncertainty as to the nationality or location of the court. Draft article 19 therefore should permit the State party to an arbitration agreement to retain the right to invoke immunity from jurisdiction before a court of a State which was not involved or was not designated by the agreement unless the agreement otherwise provided.

8. His Government would transmit its written views to the Commission regarding the law of the non-navigational uses of international watercourses, State responsibility, relations between States and international organizations, and international liability for injurious consequences arising out of acts not prohibited by international law. It welcomed the significant progress made on those questions during the Commission's forty-second session.

9. It also welcomed the report submitted by the Working Group established to consider the Commission's long-term programme of work, and was particularly pleased that the specific topics suggested included "legal principles regulating the protection of the environment", and "the international law of economic relations", in particular, "the regulation of foreign indebtedness", "legal aspects of contracts between States and foreign corporations" and "legal aspects of economic development".

10. In view of the importance which his delegation attached to the Commission's work on the codification and progressive development of international law, it wished to emphasize that such codification must not be limited merely to reaffirming existing positive law. Rather, the Commission also should strive to adapt international law to the changes taking place in international society, in order to help the international community to meet the many challenges which faced it. The items which were to be placed on the Commission's long-term agenda should truly reflect the concerns of all groups of States. His delegation accordingly agreed that in the selection of new topics, account should be taken of the pressing needs of the international community at its present stage of development in the last decade of the twentieth century.

11. Mr. HAMAI (Algeria) said that although the chapters of the report of the International Law Commission (A/45/10) were equally important, it was essential, if only to make the best use of time available for discussion, to accord priority to certain topics.

12. Turning initially to chapter III, on jurisdictional immunities of States and their property, he drew attention to part III of the draft articles provisionally

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entitled "[Limitations on] [Exceptions to] State Immunity". Without wishing to reopen the debate between the adherents of absolute and restricted immunity of States, he wished to reaffirm that the guiding principle in that area was that of immunity, accompanied by exceptions whose consequences should be carefully measured. That had in general been the approach of the Commission so far.

13. The current report offered a number of exceptions to the principle of immunity which were worthy of note. The first category consisted of exceptions whose origin - either in the legislation or in the practice of a limited number of States - did not lend them to international codification of universal scope. That was the case with the exceptions in article 13 and subparagraphs (c), (d) and (e) of paragraph 1 of article 14. A further category of exceptions should be re-examined, as they tended to impose a considerable restriction on the principle of State immunity - so much so that the legal system which would be applicable to States, if such provisions were to be included, would not adequately safeguard the sovereignty of States. It seemed similarly inappropriate to rely on the judge in the court of the forum State to determine the illicit character of an act or omission of a foreign State. In international law, it was recognized that only clearly established rules and procedures applied in that field.

14. His delegation had noted a tendency, not confined to the draft articles, to limit the jurisdictional immunity of States before the courts of other States; the tendency had appeared in only a small number of States and was thus unrepresentative. His delegation left it up to the Commission to re-examine the current wording of some of the provisions and to submit a more balanced version which would more closely reflect the international consensus on such issues, and would thus be more likely to gain the acceptance of States.

15. Turning to more specific matters raised by the draft articles, he stated his delegation's preference for the deletion of subparagraphs (c), (d) and (e) of paragraph 1 of article 14, and also for retaining the term "non-governmental" in article 18, paragraphs 1 and 4, and the term "commercial contract" instead of "civil or commercial matter" in article 19. It would also support the Special Rapporteur's recommendation for the elimination of article 20, on cases of nationalization, since nationalization was an act of sovereignty which must be excluded from the competence of foreign courts.

16. Turning to the chapter of the report which dealt with the law of the non-navigational uses of international watercourses, he said that his delegation noted with satisfaction that the Commission unanimously accepted the principle of equitable regulation of watercourses, excluding any form of unilateral regulation and stipulating consultation and co-operation between watercourse States.

17. His delegation similarly welcomed the general trend towards the establishment of joint management organizations, as it encouraged joint and mutually beneficial utilization by the watercourse States.

18. In connection with draft articles 8, 9 and 10 proposed by the Special Rapporteur on the topic of State responsibility, his delegation felt that, in

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general, the definition given of "reparation by equivalent" seemed equitable in that such reparation had a compensatory function and was intended to restore the situation which would have existed had the wrongful act not been committed. It would in fact be immoral if the State committing the wrongful act was not required to make reparation, equitably, for the harm caused. In the light of that consideration, it would be logical to re-examine the wording of paragraph 1 of article 8 in order to impose upon the State committing the wrongful act an obligation of reparation. The current wording of the paragraph did not confer on the injured State anything more than an entitlement (alternative (a)) or the right (alternative (b)) to claim compensation. There was no formal requirement for the State which had committed the wrongful act to pursue the matter. It would also seem preferable to substitute the term "compensation" for "reparation by equivalent". Compensation should cover all the types of damage suffered, both material and moral, by a State and its nationals, including both lucrum cessans and damnum emergens.

19. Doubt had been expressed as to the timeliness of codification, at the current stage of international law, with regard to international liability for injurious consequences arising out of acts not prohibited by international law (A/45/10, chap. VII). In his delegation's view, the increasing interdependence of the international community, particularly in such sensitive areas as the survival of mankind, the physical environment and the ecological balance, demanded an approach that was carefully considered, realistic, innovative and bold. In the context of that topic, it had been asked whether it was appropriate to deal with the obligations arising from activities involving risk and activities with harmful effects jointly or separately. His delegation was convinced that the two notions should be treated together, since, as the Special Rapporteur had noted, they had more features in common than distinguishing features (para. 473). Moreover, the prevention which the two notions necessarily implied covered both measures aimed at preventing the occurrence of an accident and those taken to contain or minimize the damage which might result from an accident. When an accident occurred and occasioned transboundary harm, the obligation of reparation arose whether the accident resulted from an activity involving risk or an activity with harmful effects.

20. Mr. Lukabu Khabouji N'Zaji (Zaire), Vice-Chairman, took the Chair.

21. Mr. GARRO (Peru), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that the phrase "related offences" should be defined in general terms in the Code. It should be left to the courts to determine the applicability of the definition in each specific case. The articles on complicity, conspiracy and attempt dealt with crimes which were very difficult to characterize. Those articles therefore had to be drafted with the greatest care.

22. His delegation fully agreed that illicit traffic in drugs should be characterized as a crime against humanity. The relevant draft article should include all possible subjects, whether private individuals or government officials, and should cover all internationally controlled substances. The title of the

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(Mr. Garro, Peru)

article, therefore, also should include a reference to psychotropic substances. All aspects of the crime of drug trafficking should be included in the definition. While paragraph 3 of draft article X provisionally adopted by the Commission was by and large complete, it did not include the illicit sale of chemicals required for drug production. Money-laundering, one of the most illicit aspects of the criminal process, was covered by paragraph 2 of that draft article. He emphasized the importance of mounting a very broad, multidisciplinary international attack on the scourge of drug trafficking.

23. His delegation welcomed the adoption of the draft articles on international terrorism and on the recruitment, use, financing and training of mercenaries. Draft article 18 on mercenarism, used the definition contained in the 1989 International Convention on mercenaries, an instrument which should prove effective in combating a scourge that plagued many parts of the developing world. It was essential to include a draft article in the Code on the crime of international terrorism, and the crime should be characterized as an act or omission. He was pleased that the act of tolerating terrorist acts against another State was included in the definition. The inclusion of a list of acts would underscore the dangerous nature of the crime.

24. The Commission should link the crimes of drug trafficking and terrorism in the draft Code, with a view to prompting action by the international community to combat that terrible conspiracy. The Commission also should include in the Code the topic of "breach of a treaty designed to ensure international peace and security".

25. If the draft Code was to be truly effective and not a mere declaration, it was necessary to establish an international criminal court having jurisdiction with respect to the crimes defined in the Code. The court also should be authorized to consider other crimes which States might decide to bring before it. Accordingly, a combination of the options in paragraph 123 subparagraphs (i) and (iii), of the report (A/45/10) would be desirable. As to the structure of the court, it should be a permanent body and its members should be elected in the same manner as the judges of the International Court of Justice. As to penalties, in view of the trend in many countries, the death penalty should be ruled out. Life imprisonment also should be excluded, since the objective was to rehabilitate the offenders. His delegation agreed with the Commission that the proposed court would be successful only if it was widely supported by the international community.

26. Peru welcomed the progress made on the question of jurisdictional immunities of States and their property, and hoped that the Commission would be able to complete its second reading of the draft at its next session. His delegation also welcomed the progress on the questions of the law of the non-navigational uses of international watercourses, and international liability for injurious consequences arising out of acts not prohibited by international law. His Government would transmit its views on those topics to the Commission.

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27. Mr. LOULICHKI (Morocco), referring to chapter VI of document A/45/10, said that since many existing instruments, such as headquarters agreements, dealt with the privileges and immunities of international organizations, their officials and experts, the Commission should confine itself to identifying the gaps to be filled and solving the problems revealed by the practice of previous decades. The Commission's work could take the form either of supplementary rules or of a framework agreement containing a statement of general principles intended to facilitate the interpretation of existing provisions.

28. His delegation supported the approach taken in draft article 2 of limiting the scope of the draft to international organizations of a universal character. However, the phrase "when the latter have accepted them" in paragraph 1 contained an element of uncertainty.

29. The parallel between draft article 4, which stated that the future Convention was without prejudice to existing agreements and would not preclude the conclusion of other international agreements, and draft article 11, which enabled the scope of privileges and immunities to be limited by mutual agreement of the parties concerned, made it difficult for the Commission to formulate general rules in that area.

30. Draft article 7 should be reconsidered in the light of general practice with regard to jurisdictional immunities. He had difficulty in accepting the idea that international organizations could, for functional reasons, enjoy an absolute immunity from jurisdiction, which would be greater than the immunity enjoyed by their member States. He hoped that the next report of the Special Rapporteur would be more substantial and would provide clear guidance with regard to the main topics of discussion.

31. Throughout its history, the Commission had constantly sought to improve its working methods. The fruitful dialogue between the Commission and the Sixth Committee was a valuable tool for improving the effectiveness of the Commission's deliberations. His delegation had taken note of the discussions of the Working Group on the Commission's long-term programme of work, and the suggestions made during the debate on that topic within the Committee, particularly by the German delegation. It was regrettable that the discussion of that part of the Commission's report had begun so late. Nevertheless, he had the following suggestions to make with regard to certain organizational and methodological aspects of the Commission's work. First, the holding of special sessions should not be considered unless the Commission was to finalize a set of draft articles; secondly, while the appointment of a co-Rapporteur did not appear to be advisable, a Special Rapporteur could be assisted by an expert who was not a member of the Commission; thirdly, a research group within the Commission could assist a Special Rapporteur in determining the approach to be taken with regard to the topic assigned to him; fourthly, expert bodies, such as the Institute of International Law, could be more closely associated with the Commission's work; and lastly, the idea of dividing the Commission into representative sub-committees on particular topics might be attractive, although it entailed the risk that such sub-committees might work independently of each other.

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32. Mr. DELON (France), speaking on chapter VI of the report (A/45/10), said that discussions at the Commission's forty-second session on the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States had once again raised the question of the feasibility and desirability of establishing uniform rules on that subject. His delegation had already expressed doubts in that connection at the previous session of the General Assembly. While it was true that certain basic principles, such as the principle of the equality of member States and that of the independence of international civil servants, were to be found in all existing agreements relating to the status of international organizations, it was also true that those agreements had been negotiated on a case-by-case basis and with due consideration being given to the functional requirements of the particular organization concerned and, in particular, to the nature of its activities. To take an extreme example, an organization concerned with trade activities would not necessarily have to enjoy the same jurisdictional immunities as a major political organization. Indeed, it was difficult to see why international organizations, which were not sovereign entities, should in all cases enjoy more extensive immunities than the States of which they were composed.

33. His delegation continued to take the view that article 11 (footnote 295), which was designed to limit, in the light of the functional requirements of each particular organization, the very extensive scope of its rights under the draft's other provisions, would not ensure the necessary flexibility and balance between the interests of the international organization concerned and those of the host State, and indeed of all its member States and their nationals. The fact should never be overlooked that immunities could conflict with public or individual rights.

34. Furthermore, his delegation was not convinced that matters such as the capacity of an international organization to conclude treaties or to file an international claim, referred to in paragraph 441 of the report, fell within the scope of the topic. The Commission should not proceed on the assumption that a convention on the topic was necessarily to be aimed at. Since the subject was already covered by conventions which, on the whole, were proving satisfactory, there was no need for haste. The Commission could, at a leisurely pace, envisage the preparation of a set of alternative rules for purposes of reference, as appropriate.

35. Mr. VILLAGRAN KRAMER (Guatemala), referring to chapter VI of document A/45/10, said that regional organizations such as those referred to in Chapter VIII of the Charter of the United Nations should be taken into consideration in the proposals submitted by the Commission. Chapter VIII established machinery for regional arrangements and organizations when their field of action included the settlement of international disputes. Accordingly, if the Charter attributed specific competence to such organizations, it would be illogical not to consider them in the context of relations between States and international organizations. The Special Rapporteur and the Commission should take into account the parameters established under Chapter VIII and incorporate regional organizations, such as the Organization of American States and the Organization of African Unity, into the draft if it was feasible to do so.

36. Concerning the waiver of jurisdictional immunities, he was of the view that in the contractual sphere, international organizations should not be subject to the limitations laid down in draft article 7. The last sentence of that article provided that no waiver of immunity should extend to any measure of execution or coercion. An international organization should have the capacity to contractually establish a waiver. However, such a waiver must be explicit.

37. He associated himself with the comments made by the representative of Australia concerning the recognition of international organizations. States which were members of an international organization recognized its capacity to enter into contracts, but non-member States had discretion as to whether or not such capacity should be recognized. He hoped that the Commission would take that point into consideration.

38. Mr. SHI Jiuyong (Chairman of the International Law Commission) expressed satisfaction at the thoroughness with which the Commission's report had been analysed and welcomed the General Assembly's decision to give Special Rapporteurs the opportunity to attend the Sixth Committee's debates on their respective topics. The wealth of constructive ideas and suggestions which had been presented would be carefully studied by the Commission and would be of great help in finding workable solutions to the complex issues with which it was confronted.

39. The large number of statements on the topic "Draft Code of Crimes against the Peace and Security of Mankind" testified to the interest elicited within the Committee by the elaboration of the draft Code, as well as by the question of establishing an international criminal jurisdiction. With regard to the draft Code, although opinions on specific aspects had varied, the prevailing view was that the Commission should continue its elaboration with a view to prompt completion of the first reading. As to the question of an international criminal jurisdiction, the Commission had generally been praised for the way in which it had approached the difficult task assigned to it, and for the promptness with which it had done so. It was for the Committee to determine what further action should be taken in that regard.

40. Concerning the topic "Jurisdictional immunities of States and their property", he appreciated the recognition by many members of the Committee of the substantial progress made on the draft articles during the Commission's forty-second session and was confident that the Commission would do its utmost to complete the second reading of the draft articles at its next session, thereby making its first contribution to the United Nations Decade of International Law.

41. He was grateful for the general guidelines and detailed comments provided by delegations on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. Although the element of progressive development was not present to the same degree in the two topics, there were in both cases important policy questions at stake for which the Commission had always relied on the views of the Committee. It was in relation to those two topics that he had detected a degree of uneasiness as to the

(Mr. Shi Jiuyong)

Commission's pace of work. It was true that State responsibility had been on the agenda for more than 30 years, and that current concerns, particularly the protection of the environment, gave a degree of urgency to the topic of international liability. On the other hand, it was equally true that both topics were infinitely complex and that draft articles on such sensitive areas of international law would have a lasting influence only if they were the result of an in-depth study.

42. In that context, he would not fail to convey to the Special Rapporteur and the Commission the idea of presenting the Committee with a "state of the topic" report.

43. Concerning the topic "The law of the non-navigational uses of international watercourses", he noted with pleasure that although certain key provisions of the draft articles had occasionally given rise to divergent views, satisfaction had been expressed at the fact that most of the groundwork had already been laid. There were good prospects for the Commission to complete the first reading of the draft by the end of the current term of office of its members.

44. The discussion had also revealed a convergence of views on the framework-agreement approach, the concept of the balance of interests, and the need for consistency in dealing with related topics. Even where views differed, he had detected a willingness to address the issues and to keep an open mind concerning possible solutions.

45. As to the topic "Relations between States and international organizations", several speakers had welcomed the resumption of the Commission's work, and had made useful comments on various draft articles. Those comments would be duly taken into account by the Drafting Committee and the Special Rapporteur.

46. Many valuable ideas had been presented on the question of the Commission's working methods and the relationship between the work of the Commission as an expert legal body and the process of political decision-making by Governments and the General Assembly. The Commission, with the help of its Special Rapporteurs, would make every effort to provide timely and extensive legal expertise, and was counting on the guidance of the General Assembly in helping it to achieve its goals.

47. The Commission attached importance to the International Law Seminar, which enabled young professors and lawyers, especially those from developing countries, to familiarize themselves not only with the work of the Commission, but also with the activities of the many specialized agencies located at Geneva and with international-law topics of general interest or of current international concern. The Commission regretted, however, that in 1990 not all qualified applicants from developing countries had been able to participate in the Seminar, simply because voluntary contributions from Governments had been insufficient for the grant of fellowships. He hoped that the General Assembly would appeal to States which were able to do so to make the financial contributions needed to ensure the holding of the Seminar in 1991 with the broadest possible participation.

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AGENDA ITEM 138: UNITED NATIONS DECADE OF INTERNATIONAL LAW (A/45/430 and Corr.1 and Add.1-3, A/45/666; A/C.6/45/L.5)

48. Mr. FLEISCHHAUER (Under-Secretary-General, The Legal Counsel), introducing the report of the Secretary-General (A/45/430 and Corr.1 and Add.1-3), recalled that the main purposes of the Decade of International Law, launched by General Assembly resolution 44/23, were to promote acceptance of and respect for the principles of international law; to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice; to encourage the progressive development of international law and its codification; and to encourage the teaching, study, dissemination and wider appreciation of international law. As requested by the above-mentioned resolution, the Secretary-General, in his notes of 23 January and 8 February 1990 and letters of 16 January and 2 February 1990, had sought the views of States and appropriate international bodies and non-governmental organizations to assist him in the preparation of the report. The large number of replies received and the value of the information they contained demonstrated clearly the international community's great interest in the subject. The intensive exchange of views between delegations during the 11 meetings held by the Working Group on the United Nations Decade of International Law further illustrated that interest.

49. With regard to chapter II of the report, it would be noted that the Secretary-General had considered it useful to outline first the general comments made on the subject of the Decade. Those general comments were presented in section A of the analytical summary. The rest of the analytical summary outlined the views containing suggestions on how to implement the specific purposes of the Decade as spelt out in resolution 44/23. Those specific suggestions were summarized in sections B to F. Section G dealt with the proposal to convene a third international peace conference or other suitable international conference at the end of the Decade, a question on which the Secretary-General had been specifically requested by resolution 44/23 to seek the views of States and international organizations and bodies.

50. In connection with one of the specific purposes of the Decade, namely, promoting resort to the International Court of Justice, he drew the Committee's attention to the last paragraph of section III of the 1990 report of the Secretary-General on the work of the Organization (A/45/1):

> "The rule of law in international affairs should also be promoted by a greater recourse to the International Court of Justice in not only adjudicating disputes of a legal nature, but also in rendering advisory opinion on the legal aspects of a dispute. Article 96 of the Charter authorizes the General Assembly and the Security Council to request such an opinion from the Court. I believe that the extension of this authority to the Secretary-General would greatly add to the means of peaceful solutions of international crisis situations. The suggestion is prompted by the complementary relationship between the Security Council and the Secretary-General and by the consideration that almost all situations bearing upon international peace and security require the strenuous exercise of the good offices of the Secretary-General."

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(Mr. Fleischhauer)

51. In conclusion, he expressed the hope that the report on the Decade would provide a good basis for discussion, and assist the Committee in formulating a realistic programme of action for its present and future work on the item. He wished the members of the Committee success in their first substantive work in connection with the launching of the United Nations Decade of International Law.

52. Mr. VUKAS (Yugoslavia), speaking as the Chairman of the Working Group on the United Nations Decade of International Law, introduced the Working Group's report (A/C.6/45/L.5). The Working Group had held 11 meetings, as well as informal consultations; as its Chairman, he had also conducted extensive private consultations with delegations.

53. Annex I, which contained the draft programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law, should become an integral part of the resolution on the Decade to be drafted in the course of informal consultations. The draft programme had been prepared on the basis of the suggestions made by States and international organizations in their replies to the Secretary-General and in the course of the discussions held in the Working Group. It included activities that should be commenced in the period 1990-1992. The suggestions were set out in annex II to the Working Group's report. That comprehensive list should remain a source of inspiration during the preparations for the following programmes for the Decade.

54. The proposed activities to be commenced during the first term were grouped under four headings, referred to in General Assembly resolution 44/23 as being the "main purposes" of the Decade. Compared with the long list of suggestions set out in annex II to the report, the draft programme for the first term might seem narrow and insufficiently ambitious. However, the draft programme addressed the four main purposes in an appropriate manner for the initial stage of the Decade. At the beginning of the Decade, a cautious approach should be taken to such topics as acceptance of and respect for international law, the codification and progressive development of international law, and the peaceful settlement of disputes. It was essential that particular attention should be devoted to all those major topics, if the Decade was to meet the international community's expectations and contribute to the development of a new, peaceful international legal order.

55. States, international organizations and scholarly institutions were invited to contribute to the study of such matters as: the existing procedures for the progressive development of international law and its codification; areas of international law that might be ripe for progressive development or codification; measures to strengthen the United Nations system for the maintenance of international peace and security; methods of early identification and prevention of disputes and their containment; and means and methods for the peaceful settlement of disputes between States. Once all the aspects of those main topics of contemporary international law had been analysed, the future programmes for the Decade should address specific goals necessary for the enhancement and implementation of international law.

(Mr. Vukas, Yugoslavia)

56. However, the draft programme for the first term also suggested many forms of immediate action. For example, it was suggested that States should be invited: to act in accordance with international law; to become parties to multilateral treaties; and to provide assistance and technical advice to other States in order to facilitate their participation in the multilateral treaty-making process. Particularly numerous were the activities suggested in order to encourage the teaching, study, dissemination and wider appreciation of international law. The draft programme for 1990-1992 contained a long list of such activities that could be carried out by the organizations of the United Nations system, regional organizations, States, and educational and scientific institutions.

57. Mr. VOICU (Romania) said that the importance his delegation attached to the topic was quite natural in the light of his country's total commitment to the principles and norms of international law. Romania's foreign policy had undergone a radical change, the artificial barriers the former régime had put in the way of international co-operation had been removed, traditional contacts had been renewed and reassessed, and decisive action had been taken to open up Romania to the major trends taking place in the world. Against that background, Romania had once again affirmed its right and its resolve to participate as an equal partner in the building of Europe.

58. Romania believed that international law, the principles and norms of which had been reflected in the documents of the Conference on Security and Co-operation in Europe, had a major role to play in co-ordinating joint actions aimed at building a peaceful future for Europe and the other continents. In its view, world co-operation in all fields should be based on the rule of law.

59. His delegation was satisfied with annex II to the report of the Working Group (A/C.6/45/L.5). Referring to the document as a whole, he said that the programme for the Decade should include legal and practical procedures to reinforce the part played by the principles and norms of international law in laying down rules for the conduct of all members of the world community, thus helping to stabilize international relations.

60. With regard to the second main objective of the Decade, namely, to promote means and methods for the peaceful settlement of disputes between States, Romania welcomed the recommendations contained in the report. In that context, it recalled Romania's recent decision to favour greater recourse to the International Court of Justice. With that aim in view, his country had begun to withdraw its reservations concerning the compulsory jurisdiction of the Court in respect of multilateral treaties in the humanitarian and human-rights fields. At the same time, it supported the initiative to draft a general international legal instrument on the peaceful settlement of disputes, on the lines suggested in paragraph 8 of section II (a) of annex II to the report. In that context, it also wished to stress the relevance of the provisions of General Assembly resolution 44/31, which underscored the need to continue efforts to strengthen the process of the peaceful settlement of disputes through progressive development and codification of international law and through enhancing the effectiveness of the United Nations in

(Mr. Voicu, Romania)

that field. It also welcomed the adoption by the Sixth Committee, by consensus, of decision A/C.6/45/L.7, which determined that the question of the peaceful settlement of disputes between States should be examined within the framework of the programme for the United Nations Decade of International Law and in the Special Committee on the Charter, as appropriate.

61. With regard to the third purpose of the Decade, namely, to encourage the progressive development of international law and its codification, Romania hoped that the programme for the Decade would help to expedite the preparation of new international legal instruments, in particular those currently before the International Law Commission and the United Nations Commission on International Trade Law.

62. Inasmuch as the Decade of International Law covered the same period as the International Decade for Natural Disaster Reduction, there was a need for further efforts, within both the United Nations Secretariat and all the other competent organs of the United Nations system, to ensure an optimal level of co-ordination and harmonization in areas where the objectives of the two Decades overlapped. It would therefore be useful to pool efforts to develop international humanitarian law, as an ever more important branch of general international law. It would also be advisable, as suggested in annex II to document A/C.6/45/L.5, to formulate recommendations on ways and means of stimulating the development of international humanitarian law applicable in the area of natural disasters, including the preparation of new legal instruments of a universal character on mutual assistance.

63. In broader terms, the programme for the Decade of International Law should contain recommendations on how to expedite the ratification process for multilateral legal instruments adopted under the auspices of the United Nations in the area of public and private international law, with special emphasis on instruments relating to social and humanitarian issues and fundamental human rights and freedoms. It was also important to begin drafting new legal instruments in such areas as the elimination of all forms of religious intolerance, in accordance with the relevant General Assembly resolutions.

64. The fourth purpose of the Decade, namely, to encourage the teaching, study, dissemination and wider appreciation of international law, was of particular importance in fostering universal respect for the principles and norms of international law and in consolidating the role of international law in promoting and maintaining world peace and security. The programme for the Decade should accordingly contain specific recommendations in that regard, drawing inspiration from a variety of sources. Romania supported the proposal made by the United States to develop model curricula and materials for the teaching of international law in primary and secondary schools. Such a project would involve combining the skills of educators with an expertise in international law. Efforts should also be made to enhance the effectiveness of the work of the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law.

(Mr. Voicu, Romania)

65. Romania favoured the proposal to convene an international peace conference at the end of the Decade of International Law, with a view to adopting legal instruments of a universal character to govern inter-State relations throughout the coming century.

66. It fully endorsed the recommendation that States should be encouraged to establish national, subregional and regional committees to assist in the implementation of the programme for the Decade. Romania was considering the setting up of a national committee for the Decade, and also the creation of an institute for human rights which would function under the auspices of Parliament.

67. The Decade would lead to a strengthening and diversification of the activities of the United Nations in the legal sphere, and would help it to fulfil its supreme mission under the Charter, which was to save present and succeeding generations from the scourge of war.

68. Mr. SZEKELY (Mexico) said that at the time of the adoption of the Convention for the Pacific Settlement of International Disputes, at The Hague in 1899 an earlier generation of diplomats had on the threshold of a new century looked forward, full of hope, to a genuinely lasting peace. Those hopes had, of course, been frustrated. Furthermore, even though, half-way through the twentieth century, the peoples of the United Nations had been determined to save succeeding generations from the scourge of war, over the following 45 years the international community's failure to achieve that goal had resulted in indescribable suffering for mankind.

69. The States Members of the United Nations must nevertheless persevere in their endeavour to maintain peace. Now, another generation of diplomats had the enormous responsibility of boldly seeking to achieve the rule of law in international relations as they stood on the threshold of another century.

70. Following weeks of negotiations on the activities to be conducted under the Decade, the current debate above all represented an opportunity to assess what had been achieved and to lay the foundation for future action. It was extremely important that the Decade's impact should not be ephemeral. The goal should be to promote the adoption of measures to enhance observance of the rules of the law of nations. Mankind had long aspired to achieve peace through the rule of law, and that goal could now be achieved.

71. Deciding on the content of the Decade would not be an easy task, since there was much to be done. The enthusiastic response from Member States and a large number of intergovernmental and non-governmental organizations to the Secretary-General's request for comments on the programme for the Decade was a demonstration of the importance that the international community attached to the topic under consideration. Mexico had, for its part, gladly participated in the Working Group's activities, and hoped that the draft programme for the activities to be commenced during the first term of the Decade would be adopted both by the Sixth Committee and by the General Assembly.

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(Mr. Szekely, Mexico)

72. Now that the initial task had been completed, it was necessary to guard against inertia. It would, for example, be insufficient merely to adopt follow-up measures, such as measures to promote the dissemination and wider appreciation of international law. The results achieved at the current session were highly satisfactory, but they were just a starting-point and should lead to the adoption of more ambitious measures. Some delegations, including his own, had accepted a modest, excessively general beginning for the programme for the Decade where substance was concerned, on the understanding that substantive international legal topics urgently calling for codification and progressive development would be addressed without delay. In that connection, his delegation had in mind such subjects as: international illicit arms trafficking; the glorification or justification of violence; unilateral coercive measures; the right to food; and illicit traffic in and international exploitation of minors.

73. the purposes of the Decade, as laid down in General Assembly resolution 44/23, must permeate all activities, both within and outside the Sixth Committee. Issues dealt with in the context of the Decade must in fact be given priority over other topics. In that connection, Mexico welcomed the fact that the International Law Commission had approached the task of establishing its future programme of work in the context of the purposes of the Decade. It was also of great importance that both States and international organizations should set themselves the task of encouraging the dissemination and wider appreciation of international law, which called for effective use of existing machinery, without prejudice to the development of any new forms of machinery that might become necessary.

74. For example, Mexico believed that the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law should be strengthened, and that at the next session of the General Assembly, more time should therefore be set aside for consideration of the matter, both by the Advisory Committee on the Programme and by the Sixth Committee. In due course, Mexico would put forward some proposals in that connection. At the current stage, it simply wished to draw attention to the fact that the role played by the Office of Legal Affairs and, more particularly, by the Codification Division, was often not fully appreciated. The Division's experts had supplied excellent tools for enhancing the application of international law, such as the draft handbook on the peaceful settlement of disputes between States, which the Committee had submitted to the General Assembly for adoption. The Legal Counsel must remain closely involved in such activities. A handbook on international law might be prepared on the basis of the work that the Secretariat had been carrying out for a number of years.

75. The primacy of international law must be recognized, particularly in view of the growing trend towards globalization. The principles on which Mexico's foreign policy was based were entirely in keeping with the fundamental principles of peaceful coexistence. In the past, Mexico's belief in international law had often been considered ingenuous, to say the least. However, the approach now being taken by the international community, and the revitalization of the United Nations,

(Mr. Szekely, Mexico)

proved that Mexico had been right. Mexico hoped that the members of the international community would mark the completion of the Decade by meeting at The Hague, and that such a meeting would augur well for the world.

76. Mr. PADMANABHAM (India) recalled that the Ministers for Foreign Affairs of the Movement of Non-Aligned Countries, meeting at The Hague in June 1989, had called upon the General Assembly to declare a Decade of International Law to begin in 1990 and conclude in 1999, to provide for the establishment of a commission to organize and conduct the Decade's activities, and to prepare for a third peace conference at its conclusion. After summing up the main purpose of the Decade as set forth in General Assembly resolution 44/23, he said that the Decade was also called upon to fulfil an extremely praiseworthy purpose in reaffirming faith in the usefulness of international law in safeguarding peace and security. It was because of similar initiatives that the world community had been able to conclude important agreements for the promotion of the rule of law in international relations, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Manila Declaration on the Peaceful Settlement of International Disputes and, more recently, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations. In pursuing those efforts, it was essential to show flexibility by seeking such means as might be appropriate to the circumstances and nature of each particular dispute. Both the Charter of the United Nations in its Article 33, paragraph 1, and the Manila Declaration in its paragraph 5 emphasized free of choice of means in connection with the peaceful settlement of disputes between States. While promoting the rule of law in international relations and encouraging the parties to any dispute to employ one or other of the means listed in Article 33, paragraph 1, of the Charter, it was essential not to do anything that might restrict the wide choice of means available to States.

77. The cause of peace and peaceful settlement of disputes could be adequately served only by structurally modifying the contemporary world order and taking pioneering decisions on certain vital issues facing mankind. The Movement of Non-Aligned Countries had identified such issues and emphasized their importance in its various declarations: establishment of a non-violent world order; total elimination of nuclear weapons, leading to complete and general disarmament; introduction of new dimensions in international economic relations, with emphasis on fairness and justice to all the peoples of the world; guaranteeing of fundamental civil, political, economic and social rights; and freedom and dignity for all peoples. The development of effective alternatives to the threat or use of force in international relations should be treated as being closely linked with the prospect of human survival. Recent world developments offered encouragement to work towards that noble objective. In a climate of growing readiness on the part of countries to interact on the basis of reason, goodwill, dialogue and compromise, any exercise designed to strengthen confidence in international law could be expected to produce significant results.

78. Mr. SUN Lin (China), after expressing appreciation of the work done by the Working Group on the United Nations Decade of International Law and its Chairman, said that his delegation was in favour of formulating a short-term programme of activities first, so that activities under the Decade might achieve tangible results within the next few years; the Sixth Committee should meanwhile continue with the study, discussion and formulation of further programmes for the Decade. His delegation took the view that the programme of activities as a whole should be feasible, action-oriented and acceptable to all.

79. His Government attached great importance to the Decade and hoped that activities under the Decade would strengthen the rule of international law and enhance its role in relations among States, thus helping to maintain international peace and security. China had first had submitted its proposals for the Decade in June 1990. They were reproduced in the report of the Secretary-General (A/45/430), and further proposals were to be found in document A/45/430/Add.2. One proposal was for a study on developing countries and international law. Another was for a study on developing countries and international legislation on the environment. His Government also wished to conduct some specific activities, including production of study reports or co-sponsorship of international seminars. His delegation was pleased that the proposals had met with the Working Group's general understanding and approval.

80. Another proposal submitted by his Government concerned the strengthening of the role of the International Court of Justice. China was ready to discuss the issue with other interested countries. In making the proposal, it was guided by the following initial considerations: the role of the Court should be strengthened within the framework of its Statute and Rules, whose potentialities should be fully utilized; serious study should be given to various forms of acceptance of the Court's jurisdiction, including compulsory jurisdiction under Article 36, paragraph 2, of the Statute, it being borne in mind, however, that the Court's jurisdiction was founded upon the free consent of States; States should be encouraged to accept the Court's jurisdiction in the form of special agreements or dispute-settlement clauses in conventions; wider resort to the Court for advisory opinions should be encouraged; as should be the appropriate use of the *ad hoc* chamber as an institutional means of trying cases; lastly, States should be encouraged to take steps, individually or collectively, to submit international disputes more frequently to international judicial settlement.

81. His Government intended, should a third international peace conference be convened at the end of the Decade, to propose the adoption of a declaration on principles of international law concerning peace and development. The principles of respect for sovereignty and territorial integrity, non-aggression, non-interference in internal affairs, equality and mutual benefit, and peaceful co-existence, first enunciated in 1954, by China, India and Myanmar (then known as Burma) had since achieved the status of basic principles of international relations. They should, together with other basic principles of international law, constitute an important component of the proposed declaration. The decision to adopt such a declaration would, of course, depend entirely on a consensus among all

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(Mr. Sun Lin, China)

States, and his Government's position on the issue would be consistent with that of others.

82. In conclusion, he informed the Committee that his Government had decided to contribute the sum of $10,000 to the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. Moderate as the sum was, it was intended as a concrete contribution to the United Nations Decade of International Law.

83. Mr. LEORO F. (Ecuador) said that his delegation had strongly supported the adoption of General Assembly resolution 44/23, just as it had supported the original initiative put forward in 1989 at The Hague, at the meeting of the Movement of Non-Aligned Countries. Clearly, the initiative could not have come at a better time, since the international community was now seeking to build a stable peace on the sound foundation of international law.

84. The contemporary world was developing in the context of complex interrelationships calling not only for greater respect for the principles of international law, but also for a willingness on the part of the members of the international community to co-operate with one another with a view to reducing the major discrepancies in the standards of living of the peoples of the world. More extensive co-operation clearly strengthened peace and friendly relations between peoples.

85. In order to achieve peace, States must not only refrain from using force, they must also observe the principle of peaceful settlement of disputes between States and follow the corresponding procedures. It would be appropriate, in that connection, to investigate the underlying reasons for the failure on the part of States to resort to peaceful means of settling their disputes. The prevention of international conflicts was of great importance, and States must have at their disposal appropriate ways of preventing disputes from becoming serious international conflicts. However, even more important than amendments to international agreements on the peaceful settlement of disputes was the willingness of States to resort to peaceful means of settling their disputes. States must give serious thought to the ways in which the instruments in question should be amended, and if new agreements were to be concluded States must consider what innovations would be appropriate.

86. Where the promotion of the progressive development of international law was concerned, care must be taken to ensure that the fundamental needs of all States were taken into consideration. Important though declaratory rules of international law might be, they must be supplemented by appropriate implementation procedures. A clear example of such evolution in international law was to be found in the field of human rights, where declaratory norms had led to ways and means of safeguarding such rights to an unprecedented degree. The Sixth Committee should play a more active role in activities relating to the progressive development of international law, since Governments would thus more frequently have occasion to express their views on legal instruments being prepared by the United Nations. Moreover,

(Mr. Leoro F., Ecuador)

delegations from different regions of the world could thus share experience in the legal field and provide specific examples of the activities of their various regional bodies.

87. On the issue of the encouragement of the teaching, study, dissemination and wider appreciation of international law, he said that priority must be given to the need for universities to update their relevant programmes and promote research, which, of course, called for adequate financial and scientific resources. A greater awareness of the role of both international law and international organizations would do much to promote a greater appreciation of the need for the international legal community to act in accordance with legal principles, rejecting the use of force in any form and promoting the concept of the maintenance of peace through the rule of law.

88. With regard to the issues to be considered in the context of the Decade, it was necessary to clarify which United Nations organ was to be entrusted with the task of following up the various activities and was to be responsible for the set of activities that had not been assigned to the General Assembly, the Sixth Committee, the Secretary-General or the International Law Commission.

89. Member States would be called upon to carry out intensive, demanding activities at the domestic level designed to encourage the teaching and dissemination of international law, and similar demands would be made on international organizations. Naturally, all such activities called for greater efforts and more expenditure on the part of Member States.

90. As a member of the Inter-American Juridical Committee, he wished to request the Sixth Committee's secretariat to ascertain why a note such as the one addressed by the Secretary-General to appropriate regional organs requesting their views on the Decade had not been sent to the Juridical Committee. Unfortunately, the Juridical Committee had been unaware that the Secretary-General had been addressing such a request to regional organs. It would certainly have submitted suggestions concerning the programme for the Decade, had it been invited to do so. He noted, in that connection, that the Juridical Committee was not mentioned in section II, paragraph 1, of annex I to document A/C.6/45/L.5.

91. His Government endorsed the recommendations made by the Working Group and would give the draft programme careful consideration. It would do everything within its power to carry out suitable activities at the national level, and would also co-operate in every possible way in activities at the international level.

The meeting rose at 1.10 p.m.